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IN THE SUPREME COURT OF THE STATE OF IDAHO

THE STATE OF IDAHO,)	Supreme Court No. _____
)	
Plaintiff-Respondent,)	
)	
vs)	COURT REPORTER'S TRANSCRIPT
)	
THOMAS EUGENE CREECH,)	
)	
Defendant-Appellant.)	
_____)	

BEFORE
HONORABLE J. RAY DURTSCHI
DISTRICT JUDGE

APPEAL from the District Court of the First
Judicial District of the State of Idaho, in and for the
County of Shoshone.

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A P P E A R A N C E S

WAYNE KIDWELL, Esq. Attorney General of the State of Idaho, Capitol Building, Boise, Idaho, for and on behalf of the plaintiff-respondent.

BRUCE O. ROBINSON, Esq., Post Office Box 8, Nampa, Idaho, appearing for and on behalf of the defendant-appellant.

1 IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
2 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE
3
4

5 THE STATE OF IDAHO,)
6)

7 Plaintiff,)

8 VS)

9 THOMAS EUGENE CREECH,)

10 Defendant.)
11
12

Cr. No. 2165

REPORTER'S TRANSCRIPT

13 BEFORE

14 HONORABLE J. RAY DURTSCHI

15 DISTRICT JUDGE
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17

18 BE IT REMEMBERED, That the above-entitled matter came
19 on for hearing and trial before the Honorable J. Ray Durtschi,
20 District Judge, with a jury, at Cascade, Idaho, May 20, 1975
21 through May 22, 1975, and at Fallace, Idaho, October 6, 1975
22 through October 22, 1975.
23
24
25

A P P E A R A N C E S

ROBERT REMAKLUS, Esq., Prosecuting Attorney, Cascade, Idaho, and
LYNN THOMAS, Esq., Deputy Attorney General, Statehouse, Boise,
Idaho, appearing for and on behalf of the plaintiff.

BRUCE O. ROBINSON, Esq., Post Office Box 8, Mampa, Idaho,
appearing for and on behalf of the defendant, and

WARD HOWER, Esq., Post Office Box 799, Cascade, Idaho,
appearing for and on behalf of the defendant.

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF SHOSHONE

THE STATE OF IDAHO,

Plaintiff-Respondent,

vs

THOMAS EUGENE CREECH,

Defendant-Appellant.

) Cr. No. 2165
)
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) LODGMENT OF COURT
) REPORTER'S TRANSCRIPT
) ON APPEAL
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RECEIVED from John W. Gambee, Official Court Reporter
of the above-entitled court, and lodged with me this ____ day
of _____, 1976, original plus _____ copies of
the Court Reporter's Transcript on Appeal.

CLERK OF THE DISTRICT COURT

Deputy

1 WALLACE, IDAHO, TUESDAY, OCTOBER 21, 1975, 9:30 A.M.

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4 THE COURT: Before we bring the jury in, I wanted to add
5 one thing to the record as part of Dr. Estess' testimony
6 primarily to show the basis which the Court stopped him from
7 testifying at one point.

8 I think that's reflected in his written report which
9 I was following at the time and I'm going to ask that it be
10 marked as State's Exhibit 70 and just admitted for the
11 limited purpose of reflecting the basis for the Court's action
12 and ruling in his testimony and not to go to the jury.

13 (State's Exhibit No. 70 marked for identification
14 and admitted into evidence.)

15 THE COURT: Counsel ready to proceed?

16 MR. REMAKLUS: Yes, Your Honor.

17 MR. ROBINSON: Yes, Your Honor.

18 THE COURT: Bring the jury in.

19 (Jurors re-entered the courtroom.)

20 THE COURT: Show the jurors are all present.

21 Call your next witness.

22 MR. REMAKLUS: Call Miss Kathy Spaulding.
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1 KATHY SPAULDING,
2 a witness on behalf of the State, having been first duly sworn
3 for rebuttal examination, took the stand and testified as follows:
4

5 DIRECT EXAMINATION

6 BY MR. REMAKLUS:

7 Q State your name, please.

8 A Kathy Spaulding.

9 Q I want you to speak up so all the jurors can hear
10 you, now, Miss Spaulding.

11 Where do you live, Miss Spaulding?

12 A Lewiston, Idaho.

13 Q And how long have you lived at Lewiston?

14 A Seven years.

15 Q And are you the sister to Carol Spaulding?

16 A Yes, I am.

17 Q And what is your address in Lewiston?

18 A 2404 Eighth Avenue.

19 Q And who lives at that address?

20 A My mother and my brother and Bill Schreiber.

21 Q And were you -- directing your attention to the
22 3rd day of November, 1974, were you at Lewiston, Idaho?

23 A No, I was in Spokane, Washington.

24 Q And what were you doing in Spokane on that day?

25 A I went to the World's Fair.

1 Q Who did you go with?
2 A Mrs. Knutson and her three daughters.
3 Q And from where did you go to the World's Fair?
4 A From Lewiston.
5 Q So, you were in Lewiston in the morning. What
6 time did you leave for the Fair; do you remember?
7 A Oh, early, about 8:00 or 9:00.
8 Q And whose car did you go in?
9 A Mrs. Knutson's.
10 Q And did you spend all day at the Fair?
11 A Yes, we did.
12 Q Do you remember about when you got home from the
13 Fair?
14 A About 9:30 that night.
15 Q And did you go right home that evening?
16 A Yes.
17 Q Did Mrs. Knutson take you home?
18 A Yes, she did.
19 Q What, if anything, did you do after you got home,
20 Miss Spaulding?
21 A Her two daughters came in to visit me for a few
22 minutes and they went home and I went to bed.
23 Q Where did the Knutsons live; do you know?
24 A 2502 Eighth Avenue. It's about three houses up
25 from where we live.

1 Q That's there in Lewiston, Idaho?
2 A Yes.
3 Q After the girls went home, what, if anything, did
4 you do?
5 A I went to bed.
6 Q And did you stay home all night?
7 A Yes.
8 Q Do you remember, thinking back to the next day,
9 can you -- do you remember what you did the next day?
10 A I went to school.
11 Q And what time did you ordinarily get up to go to
12 school, Miss Spaulding?
13 A 7:00.
14 Q Are you acquainted with Dan Carey?
15 A Yes, I am.
16 Q Did you see him on the 3rd -- November 3rd?
17 A No.
18 Q Were you -- did you go down to the vicinity of
19 Donnelly, Idaho, on the night of November 3rd, 1974?
20 A No, I didn't.
21 Q Were you present or participate in the killings of
22 Tom Arnold and Wayne Bradford?
23 A No.
24 MR. REMAKLUS: You may examine.
25

1 CROSS EXAMINATION

2 BY MR. ROBINSON:

3 Q Kathy, were you with your sister Carol, Dan and
4 Tom on November the 2nd?

5 A No, I wasn't.

6 Q Do you recall where you were that day?

7 A I was at the World's Fair.

8 Q On Saturday the 2nd?

9 A Oh, no -- yeah, I saw Tom and Carol and Dan on
10 Saturday the 2nd.

11 Q All right. And they went over to Clarkston on that
12 day. Were you with them on that day?

13 A No, I stayed home that day.

14 Q And did you return -- or when they returned from
15 Clarkston did you go with them to the park?

16 A No.

17 Q Do you own a "bird shirt", a shirt that had birds
18 on it?

19 A Yes.

20 MR. REMAKLUS: Object on the ground it's outside the
21 direct examination, Your Honor.

22 THE COURT: Overruled. The answer may stand.

23 THE WITNESS: Yes, I give it to my sister.

24 Q BY MR. ROBINSON: You gave that shirt that had
25 birds on it to Carol?

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A. Yes.

Q When did you give that shirt to her?

A. Before she left, Saturday.

Q And did you give it to her on Saturday? She had that with her in her trip south to Boise?

A. Yes.

Q Do you smoke pot?

MR. REMAKLUS: Object on the grounds this is outside the direct examination, Your Honor. It has no bearing on the issues in this case.

THE COURT: Overruled.

Q BY MR. ROBINSON: You may answer.

A. Yes, I have smoked grass.

Q And during this weekend of November the 2nd and 3rd, 1974, did you smoke pot or grass on that weekend?

A. No.

Q Kathy, did you actually tell your mother that you were going to Expo '74 in Spokane?

A. Yes, I did.

Q And go elsewhere?

A. No.

Q You did go to the World's Fair?

A. Yes.

Q What are the names of those three daughters of Mrs. Knutson's?

1 A. Pam Anderson, Lisa Anderson and Judy Anderson.

2 Q Now, were you pretty much free to come and go as
3 you wished at that time?

4 MR. REMAKLUS: I'm going to object again outside of the
5 scope of the direct examination, Your Honor.

6 THE COURT: Overruled.

7 THE WITNESS: Yes.

8 MR. ROBINSON: I have nothing further.

9 MR. REMAKLUS: You may step down.

10 May Miss Spaulding be excused?

11 MR. ROBINSON: As far as the Defense is concerned she
12 may.

13 THE COURT: You may leave if you wish to.

14 THE WITNESS: Thank you.

15 MR. REMAKLUS: Call Mrs. Knutson.

16

17 MYRTLE KNUTSON,

18 called as a witness on behalf of the State, being first duly
19 sworn on rebuttal examination, took the stand and testified as
20 follows:

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DIRECT EXAMINATION

BY MR. REMAKLUS:

Q Would you state your name, please.

A Myrtle Knutson.

Q And where do you live, Mrs. Knutson?

A Lewiston, Idaho.

Q How long have you lived there?

A Since 1963.

Q And are you employed?

A Yes, I am.

Q And by whom?

A Nez Perce County.

Q And what is your job?

A I'm a Deputy Assessor.

Q How long have you been a Deputy Assessor?

A A little over ten years.

Q And what is your street address in Lewiston,
Mrs. Knutson?

A 2502 Eighth Avenue.

Q And do you know Kathy Spaulding?

A Yes, I do.

Q And do you know where she lives?

A Yes. She lives down the street. I don't recall
the exact house number, about three houses down.

Q Three houses down from your house?

1 A. Yes, right.
2 Q And do you have children?
3 A Yes, I do.
4 Q And what are their names?
5 A George Anderson, Judy Anderson, Pam Anderson and
6 Lisa Anderson.
7 Q They live with you?
8 A Judy and George Anderson are in Anchorage, Alaska.
9 Q And Pam and Lisa live with you?
10 A The two oldest are 23 and 21, so they are out on
11 their own.
12 Q Um-hmm. And how old are the other two?
13 A Fifteen and sixteen.
14 Q Directing your attention to the 3rd day of
15 November, 1974, can you tell us what, if anything, you did on
16 that date?
17 A Yes, I was to the World's Fair in Spokane.
18 Q How do you establish that date, Mrs. Knutson?
19 A Well, it was the last day and it was a Sunday and
20 it was the last chance we had to go.
21 Q And did anyone accompany you to the World's Fair
22 that day?
23 A Yes, they did, my daughter Judy, Pam, Lisa and
24 Kathy Spaulding.
25 Q And did you take your car?

1 A. Yes, I did.
2 Q. Did you drive it?
3 A. Yes, I drove.
4 Q. Do you remember what time you left Lewiston for the
5 World's Fair?
6 A. I would say in the vicinity of 8:00 in the morning.
7 Q. And that was the World's Fair in Spokane, Washington?
8 A. That's correct.
9 Q. Did you go right from Lewiston to the Fair,
10 Mrs. Knutson?
11 A. Yes, we did.
12 Q. How long did you spend at the Fair? Do you have
13 any idea?
14 A. We were there all day, I would say it was getting
15 dark when we left up there and we arrived home around 9:30
16 in the evening.
17 Q. And what, if anything, did you do when you arrived
18 home?
19 A. I dropped Kathy off at her house and the girls
20 went down to visit her.
21 Q. Those are your daughters?
22 A. Judy and Pam and Lisa, sorry.
23 Q. Went to visit Kathy?
24 A. Right.
25 Q. Well, what time of day did you say that was?

1 A. That evening?

2 Q. Yes.

3 A. We got home around 9:30, I would say it was
4 around 10:00 or such a matter in that time.

5 Q. And when was the last time you saw Kathy that
6 evening, Kathy Spaulding?

7 A. When I dropped her off; which would be around
8 9:30.

9 MR. REMAKLUS: I have no further questions.

10

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CROSS EXAMINATION

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BY MR. ROBINSON:

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14 Q. Mrs. Knutson, how many times during 1974 did you
attend the Expo '74?

15

A. That was the only time.

16

17 Q. And you specifically recall that this date was the
last weekend of Expo '74?

18

A. Yes, I do.

19

20 Q. And is there anything else that sets in your mind
that it was the weekend of November the 2nd and 3rd?

21

A. Well, it was the last day of the Fair.

22

23 Q. All right. And have you checked, yourself, as to
whether or not the last day of the Fair was November 2nd or
24 3rd or the last weekend in October?

25

A. Well, maybe not specifically, but I think Sunday

1 this year comes on, what, the 1st, and backs up? Should be
2 pretty close.

3 Q Could there be some confusion in your mind as to
4 the weekend you actually went to Expo?

5 A Not really. I believe it was the 3rd of November.

6 MR. ROBINSON: I have no further questions.

7 MR. REMAKLUS: I have no further questions.

8 Thank you, Mrs. Knutson.

9 May this witness be excused?

10 MR. ROBINSON: She may be as far as we're concerned,
11 Your Honor.

12 THE COURT: You may leave if you wish to.

13 MR. REMAKLUS: Like to call Bill Schreiber. The witness
14 has already been sworn.

15 THE COURT: Yes, you may take the stand. You are still
16 under oath, Mr. Schreiber.

17
18 WILLIAM SCHREIBER,
19 called as a witness on behalf of the State for rebuttal
20 examination, having been previously duly sworn, took the stand
21 and testified as follows:

DIRECT EXAMINATION

BY MR. REMAKLUS:

Q Mr. Schreiber, directing your attention to November 3rd, 1974, did you know that Kathy Spaulding went to the World's Fair?

A Yes, I knew that.

Q And do you know of your own knowledge when she returned from the World's Fair that evening?

A Oh, yes.

Q When was that -- were you home when she got home?

A Yes, around 9:30 or something like that, yeah.

Q Mr. Schreiber, can you tell me, do you remember when Kathy went to bed that night?

A I imagine, oh, it was at least an hour after she got home that she went to bed, yeah.

Q Did you see her in bed that night?

A Yes, I saw her in bed.

Q Would you explain that, please, Mr. Schreiber?

A Well, I have to come right through -- she was -- there's what you call these hide-a -- not -- well, a couch that makes out, what do you call them?

Q Like a bed, day bed?

A Yeah, Simmons, a Simmons bed, anyway, that you fold out, a couch in the daytime and bed at night and it's in the living room and she makes that out and that's what she was

1 sleeping on.

2 Q And did you see her there sleeping that night?

3 A Oh, yes.

4 Q Do you have any idea what time that would have been,
5 Mr. Schreiber?

6 A Well, it must have been anywhere past 10:30,
7 10:30 to 11:00 when I went to bed.

8 Q What is your habit or custom to do in the evenings?

9 A Well, after I go to bed I usually have a bunch of
10 magazines there and I read until about 3:00 -- well, when the
11 mill whistle blows that's when shift changes and at 3:00 I
12 turn out the light or, if there's just a little bit of a story
13 left I finish it and, maybe, 3:30. But, it's never before then.
14 I always am awake until 3:00.

15 Q Directing your attention to the night of
16 November the 3rd and the early morning hours of November 4,
17 1974, did you do that same customary thing?

18 A Well, I always do it. I'm positive I did because
19 that's my habit every night. I never miss a night doing that
20 because I can't go to sleep right when I go to bed and I always
21 read until 3:00, until the mill whistle blows.

22 Q Which whistle is this?

23 A Potlatch Forest mill whistle there. It's about a
24 mile and a half from us.

25 Q And you can hear?

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A. Oh, we can hear it very plainly, yes.

Q Now, directing your attention again to the night of November 3rd and the early morning hours of November 4, 1974, could you observe whether or not Kathy Spaulding left the house that time?

A. No, she never left the house. Once she's asleep, it takes a stick of dynamite to wake her up, I'll tell you.

Q And you were awake until --

A. Well, I was awake until 3:00 and I could have heard -- see, the front door is here (indicating) and my bedroom door is right here (indicating). I could have heard -- I always hear anything that's going in or out there. You couldn't possibly open it without me knowing it.

Q Nobody went in or out that night?

A. Nobody went in or out that night.

MR. REMAKLUS: No further questions.

CROSS EXAMINATION

BY MR. ROBINSON:

Q And is there a back door there also?

A There's a back door, um-hmm, and that can't be opened without hearing it because it sticks.

Q All right. Mr. Schreiber, what makes you so positive that it was that weekend of November 2nd that -- oh, yes, November 2nd and 3rd?

A Well, you mean --

Q That Kathy went to the Fair and came home?

A That's because it's the same day that Mr. Creech and Kathy -- Carol left the same day because, if -- well, I think I would have known that if Kathy went to the Fair that morning because she wasn't there. When they were there, she left about, oh, 8:00 with Mrs. Knutson and her daughters.

Q And you do recall it was the very same day?

A Oh, yes, yes.

MR. ROBINSON: I have no further questions.

THE WITNESS: That's what reminded me of it was Mr. Creech and Carol left the same day.

MR. ROBINSON: Okay.

MR. REMAKLUS: Thank you.

May this witness be excused?

MR. ROBINSON: He may as far as we're concerned.

THE COURT: You may leave if you wish to, Mr. Schreiber.

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MR. REMAKLUS: Thank you, Mr. Schreiber.

Your Honor, we have additional witnesses that don't appear to be in the courtroom. I'm wondering if we could have a brief recess. They are on their way into court.

THE COURT: We will take a short recess, then, ladies and gentlemen. If you will remember the admonition, don't discuss the case and keep your minds open.

(Recess taken.)

THE COURT: Show the jurors are all present.

MR. REMAKLUS: Mrs. Smith, would you step forward to be sworn, please.

CHARLOTTE SMITH,
a witness on behalf of the State, having been first duly sworn for rebuttal examination, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. REMAKLUS:

Q Would you state your name, please.

A Charlotte Smith.

Q What kind -- turn so the jury can hear you, please,
Mrs. Smith.

Where do you live?

A 1329 Fifth Street, Clarkston, Washington.

Q Is that just across the river from Lewiston, Idaho?

A Right, just across the bridge.

Q And do you have any children?

A Yes, I have three sons.

Q And what are their names, please?

A Mike is my oldest son, he's 22, Dan is my middle
son, he is 20 and I have a 13-year old son, Jeff.

Q And what are their last names?

A Mike and Dan's last name are both Carey.

Q You are the mother of Dan Carey?

A Yes.

Q And are you employed, Mrs. Smith?

A No, I'm a housewife and mother.

Q And you were -- directing your attention to the
2nd and 3rd days of November, 1974, were you at home there in
Clarkston, Washington?

A Yes, I was.

1 Q What does Mr. Smith do?
2 A He sells cars.
3 Q And do you know whether or not your son, Dan Carey,
4 was with you on the weekend that I have asked you about?
5 A Yes, he was.
6 Q And how do you know that, Mrs. Smith?
7 A Well, the 2nd was Saturday, my husband always works
8 Saturdays and that's the day I went with Dan down to get tires
9 put on his car and I have my receipt for the day he put the
10 tires on his car.
11 Q Um-hmm.
12 A And the 3rd I was pretty upset that day because
13 his car broke down the day after I put the tires on. I was
14 getting his car ready because he was in college up at the
15 Vo. Tech. and he needed the car for transportation and get back
16 and forth to school.
17 Q What's the vocation --
18 A Lewis Clark State Vocational School. He was
19 enrolled in auto mechanics.
20 Q Yes, that's in --
21 A Yes. So, his car was parked out front of the
22 house the 3rd, then, because it wouldn't run.
23 Q And that would be Sunday the 3rd?
24 A Um-hmm. And we were going to go Monday and get it
25 repaired.

1 Q Um-hmm. Do you know whether or not your son,
2 Dan Carey, spent the night of Sunday, November 3rd, 1974, with
3 you?
4 A Yes, he did.
5 Q And how do you know that?
6 A Well, November 3rd was my mother-in-law's birthday
7 and I fixed a cake for her and we were going out to their
8 house with cake and presents and Dan -- I said you are going
9 with us, he said no, I'm going to church with the
10 Brinkerhoffs and, so, he left to go to church with them about
11 5:30.
12 Q Um-hmm. And, then, did you go over to your
13 mother-in-law's?
14 A Yes, we did, and we went over, oh, about 6:30 or
15 7:00 and we come home at 9:00 and he was there.
16 Q Did he stay with you that night?
17 A Yes, he stayed all night because I had to take him
18 to school the next morning.
19 Q And' did you take him to school the next morning?
20 A I certainly did.
21 Q Um-hmm. What time did you leave the house?
22 A School starts at 8:00 so we had to leave by at
23 least a quarter to to get him there in time.
24 Q Was there anything else that fixes a date of
25 November 4th in your mind?

1 A. That's my other son's birthday and, so, I know
2 what day it was then, too.

3 Q. And did you take Danny to school that morning?
4 MR. ROBINSON: Object, repetitious.
5 THE COURT: Yes, I'll sustain the objection.
6 MR. REMAKLUS: Excuse me.
7 THE WITNESS: I also picked him up at 3:00.
8 MR. ROBINSON: Objection to the answer --
9 THE COURT: I'll strike the volunteered statement and
10 instruct you to disregard it, ladies and gentlemen.
11 Just wait until questions are asked.

12 Q. BY MR. REMAKLUS: Mrs. Smith, is your son Dan
13 Carey that you are referring to present in the courtroom?
14 A. Yes, he is. Sitting right down there in the front
15 row.
16 MR. REMAKLUS: Could we have your son stand up, please.
17 Dan Carey.
18 Q. BY MR. REMAKLUS: Is that your son Dan Carey that
19 you are referring to?
20 A. Yes, it is.
21 MR. REMAKLUS: I have no further questions.
22 MR. ROBINSON: No questions, Your Honor.
23 THE COURT: You may step down.
24 MR. REMAKLUS: May this witness be excused?
25 MR. ROBINSON: As far as we're concerned, yes.

1 THE COURT: Yes, you may be excused if you wish to leave,
2 Mrs. Smith.

3 MR. REMAKLUS: Like to call Dr. J. H. Treleaven.
4

5 JOSEPH HERBERT TRELEAVEN,
6 called as a witness on behalf of the State, being first duly
7 sworn for rebuttal examination, took the witness stand and
8 testified as follows:

9
10 DIRECT EXAMINATION

11 BY MR. REMAKLUS:

12 Q Would you state your full name, please, Doctor.

13 A Joseph Herbert Treleaven.

14 Q And where do you live, Doctor?

15 A Salem, Oregon.

16 Q And what is your occupation?

17 A I'm a physician specializing in psychiatry.

18 Q And by whom are you employed?

19 A The State of Oregon, Oregon State Hospital.

20 Q And how long have you been so employed, Doctor?

21 A For the last time about nine years.

22 Q And is that the Oregon State Hospital there in
23 Salem, Oregon?

24 A Yes, that's correct.

25 Q Doctor -- would you give us a summary of your

1 educational background, please.

2 A. I graduated from the University of Alberta Medical
3 School in Edmonton, Alberta. I spent one year as an intern,
4 I spent four years in specialty training as a psychiatrist, one
5 year at the Menninger Foundation, one year at Oregon State
6 Hospital, one year at a clinic in British Columbia and one year
7 at the Panell Foundation Hospital in Seattle and I passed the
8 examinations of the Board of Psychiatry and Neurology in
9 psychiatry in 1958.

10 Q. And have you been pursuing your profession as a
11 psychiatrist ever since?

12 A. I've been full time in psychiatry for approximately
13 24 years.

14 Q. Now, Dr. Treleaven, are you acquainted with the
15 defendant in this action, Thomas E. Creech?

16 A. Yes, I am.

17 Q. And is he present in the courtroom?

18 A. Yes.

19 Q. Would you tell what he's wearing, please.

20 A. A black shirt.

21 Q. And is he seated at counsel table?

22 A. Right in front of me, yes.

23 MR. REMAKLUS: May the record show, Your Honor, that he
24 indicated the defendant?

25 THE COURT: Yes, it may.

1 Q BY MR. REMAKLUS: Doctor, when did you first meet
2 Mr. Creech?

3 A On April the 9th, 1974.

4 Q Where?

5 A At the Oregon State Hospital.

6 Q And what then was the purpose of that meeting?

7 A He was sent to the hospital by a District Court
8 Judge in Multnomah County in the Portland area for an examination
9 and for treatment while he was under indictment for some
10 criminal charges.

11 Q Did you make a psychiatric evaluation of him at
12 that time?

13 A Yes, I did.

14 Q And what did you do -- what kind of an evaluation
15 did you make? Would you explain that, please?

16 A Well, our evaluation consists of several
17 psychiatric interviews and observation on our psychiatric
18 security unit where we do all of the medical-legal psychiatric
19 examinations for the State.

20 Persons under observation by our specialists, our
21 trained aides and nurses; as well as myself and the person has
22 a complete physical examination and there is some routine
23 laboratory tests that we run.

24 Q And after these tests were run, you made your
25 examination, did you arrive at any conclusion as to the mental

1 condition of this defendant?

2 A. Yes, I did. I should add one thing; that all of
3 our medical-legal examinations are reviewed by a staff of
4 senior psychiatrists at the hospital, we call the Disposition
5 Board, which I consider part of the examination too.

6 Q. And who's on this Board, Doctor?

7 A. All of the experienced psychiatrists that work on
8 the psychiatric security unit and the superintendent of the
9 hospital.

10 Q. And how many doctors would that be?

11 A. Oh, it usually runs about five or six.

12 Q. What diagnosis, if any, did you make of this
13 defendant at that time?

14 A. It was my opinion at that time that Mr. Creech
15 warranted two diagnoses, one was an antisocial personality and
16 the other was a possible psychoneurotic reaction, hysterical-type
17 and conversion symptoms, which consisted of anxiety and
18 difficulty in breathing; especially when he found himself in an
19 enclosed space.

20 Q. Did you find any evidence of mental illness or
21 mental defect?

22 A. I'm not sure I know what you mean by that question.
23 The psychoneurosis is a mild-type of mental abnormality --

24 Q. Would --

25 A. -- but, I didn't find any evidence of psychosis if

1 that's what you are talking about.

2 Q Now, is this -- was this diagnosis reviewed by your
3 Board?

4 A Yes, it was, and the Board concurred with that
5 opinion.

6 Q Um-hmm. And how long did you have this defendant
7 under observation there at the hospital at that time?

8 A He was at the hospital for ten days during that
9 period of examination, from April the 9th until the 19th.

10 Q And did you have occasion, after that, to examine --
11 or do you know whether or not after that this defendant was
12 returned to the Oregon State Hospital?

13 A Yes, he was returned to the unit. I'm the
14 supervisor of that psychiatric security unit so I'm aware of
15 all the admissions and he was returned on the 24th of May,
16 1974 under a civil commitment. Apparently the criminal charges
17 had been dropped and he was committed for further treatment
18 at the hospital at that time.

19 Q And was treatment -- did he receive treatment?

20 A Yes. He was treated on the general psychiatric
21 section of the hospital; which is essentially an open hospital,
22 for a period of from May the 24th until June the 20th.

23 Q And was he released June 20th?

24 A Yes, he was.

25 Q And what -- do you have the hospital records with

1 you, Doctor?

2 A. Yes, I do. I have them right here. I should say
3 that he was again presented to the Hospital Disposition Board
4 where I was present and reviewed his case on May 30, 1974
5 prior to transferring him from the maximum security of the
6 hospital to the open section of the hospital. So, I reviewed
7 his case again at that time.

8 Q. And what -- what did you determine at that time?

9 A. Well, we determined that the diagnoses were
10 essentially the same as before. One of the doctors that
11 examined him on the second admission added, "depressive
12 neurosis" to the diagnosis based on the history of him being
13 depressed while he was in jail. But, otherwise we found him
14 essentially the same as when we first examined him in April of
15 '74.

16 Q. Then, there was no -- you determined no evidence of
17 mental disease or defect at that time; is that correct?

18 A. Not other than those conditions I mentioned.

19 Q. And was the -- would you define the last term that
20 you just used on the depressive --

21 A. Well, I think the easiest way to look at it is,
22 most of us get depressed from time to time and depressed
23 neurosis is just when you get depressed enough that you feel
24 very unhappy, or very uncomfortable and you may or may not be
25 able to carry on with your normal functioning; in contrast to

1 a psychotic depression where you become so depressed that you
2 think the world is coming to an end or that you committed the
3 unpardonable sin and you lose contact with reality. That's
4 the difference.

5 Q And there was no psychotic depression here?

6 A NO.

7 Q And when do your records show that this defendant
8 was discharged from the hospital?

9 A On June the 20th, 1974.

10 Q And what was his final diagnosis at that time?

11 A Final diagnosis was, again, antisocial personality
12 disorder and neurosis, hysterical conversion-type. So, he
13 left with the initial two diagnoses that I gave him on the
14 first admission.

15 Q And do you have copies of the hospital records
16 with you?

17 A Yes, I do.

18 Q Are they photocopies, Doctor?

19 A Yes, they are.

20 MR. REMAKLUS: May I have them, please.

21 Those are so voluminous I don't think I'll ask to
22 have them marked.

23 You may examine, Mr. Robinson.
24
25

1 CROSS EXAMINATION

2 BY MR. ROBINSON:

3 Q Dr. Treleaven, you say you were supervisor of that
4 psychiatric ward at the Oregon State Hospital from the 9th day
5 of April, through the 18th day of April, 1974?

6 A I'm the clinical director at Oregon State Hospital
7 and I've been supervisor of that unit since 1966.

8 Q All right, sir. Doctor, in this capacity did
9 Thomas Eugene Creech's case come under your supervision?

10 A It was under my direct care. I was the examining
11 physician and, then, I share in the actual examination and
12 treatment of patients with the other doctors assigned to the
13 unit.

14 Q All right. And did you reduce, not only the
15 history that was taken, but also your medical findings to a
16 written report dated April 22nd, 1974 and typed on
17 April 25, 1974?

18 A Well, I know I sent a report to the Court and I
19 believe those were the dates. I can check it on my file here
20 if you wish.

21 Yes, the date of the report was April 25 and the
22 -- that's correct.

23 Q And that contains the case summary and your
24 findings; is that correct?

25 A That's correct.

1 MR. ROBINSON: May I have your copy, please. May I
2 approach the witness, Your Honor?

3 THE COURT: Yes.

4 Q BY MR. ROBINSON: In addition to what you handed me,
5 Doctor, do you have those documents marked "Release Summary,
6 Case Summary, Psychosocial History" of two pages and then the
7 case summary and your diagnosis dictated on 4-22-74 and typed
8 4-25-74?

9 A Yes, I do.

10 Q May I have those, sir.

11 A I hope you'll return those. These are the only
12 originals.

13 Q Doctor, I intend to move those to be admitted into
14 evidence and I'm sure we can get permission of the Court to
15 make copies.

16 THE COURT: You want to offer them with leave to
17 substitute copies?

18 MR. ROBINSON: Yes, Your Honor.

19 THE COURT: All right. We can do it that way, Doctor.

20 MR. ROBINSON: Thank you, sir.

21 May I have just a second to examine them, Your Honor?

22 THE COURT: Yes.

23 MR. ROBINSON: Mark these, please.

24 (Defendant's Exhibit N marked for identification.)

25 MR. ROBINSON: May I approach the witness?

1 THE COURT: Yes.

2 Q BY MR. ROBINSON: Doctor, I hand you what's been
3 marked now as Defendant's Exhibit No. N and ask you whether or
4 not that is the written report, the first two pages that you
5 first referred to, dated April 25, 1974 and the other pages
6 being the case summary, psychosocial history and release
7 summary?

8 A Excuse me, you missed the psychosocial history and
9 that's here. Do you want it too?

10 Q Yes, please, Doctor.

11 A I'm sorry, I didn't hear you.

12 Q Then, what you now have in your hand is the
13 complete document that we were referring to that I asked you
14 for; is that correct?

15 A That's correct.

16 MR. ROBINSON: And with the Court's permission, I'll
17 have those two pages attached to the back and I move the
18 admission.

19 THE COURT: Yes, they may be made a part of the Exhibit N
20 so it is complete.

21 MR. ROBINSON: All right, sir, and I move the admission
22 of Defendant's Exhibit No. N.

23 MR. REMAKLUS: We have no objection and would stipulate
24 that a photocopy may be substituted in lieu thereof.

25 THE COURT: All right, N will be admitted with leave to

1 substitute copies so the original can be returned to the Doctor.

2 MR. ROBINSON: Thank you very much, Your Honor.

3 (Defendant's Exhibit N admitted into evidence.)

4 Q BY MR. ROBINSON: Doctor, what did you define as
5 an "antisocial personality"?

6 A It's a person whose behavior pattern over a period
7 of years brings them into repeated conflicts with rules of
8 society.

9 Q All right. And that's -- that is a general
10 situation of the meaning of that term to you as a psychiatrist?

11 A Yes, yes.

12 Q All right. And in your examination and evaluation,
13 did you find, at that time, April of 1974, Thomas Eugene Creech
14 to be of the usual or unusual-type of antisocial personality?

15 A I would say he was fairly usual, yes.

16 Q Fairly usual?

17 A Um-hmm.

18 Q All right. And then the term "psychoneurotic
19 features" were used. Would you define those, please, Doctor?

20 A Well, psychoneurosis is a state of malfunction of
21 the mind in which a person subjectively feels distressed, or
22 behaves in a way which is distressing to them and those around
23 them.

24 There are different types such as just simple
25 anxiety. If it's sufficiently severe that it incapacitates a

1 person, or makes his life miserable, then we call it a
2 neurosis or a person, as I mentioned before, might become
3 depressed to the point that he's very unhappy or unable to
4 function. That's a neurosis. Or a person may, instead of
5 experiencing the anxiety, convert it into some sort of a
6 physical symptom such as a paralysis of the arm, he can't move
7 his arm. But, when you examine the nerves and the muscles and
8 bones are all intact but it's something in the mind that
9 prevents them from moving his arm.

10 That's a hysterical neurosis.

11 Q And did you find Tom Creech to have these
12 particular features at that time?

13 A We found -- well, the history was that in the
14 courtroom he had a spell of difficulty in breathing if -- and
15 once while he was at the hospital during the initial period of
16 examination when he was placed in a room by himself against
17 his will he had a period of difficulty in breathing.

18 This could either be something that was put on
19 intentionally or it could be one of these hysterical symptoms
20 which was unintentional, an expression of anxiety and I
21 confess that I had no way of knowing which it was. But, I
22 presumed it might be hysterical, that's why I gave him this
23 diagnosis.

24 Q All right, sir. And, Dr. Treleaven, at the time
25 and during this period from April the 9th, 1974 to April the

1 18th, 1974, did part of the history that you took from
2 Tom Creech include the fact that he had, approximately a month
3 prior to that time, been acquitted of a murder charge in
4 Tucson, Arizona?

5 A. That's correct.

6 Q. And all of this history that was then related to
7 you, that is contained in these reports, were considered by you
8 in your diagnosis?

9 A. Of course, yes.

10 Q. And, Dr. Treleaven, do you also have supervision
11 of Tomisene Creech, Tom's wife, under your supervision at --

12 A. She is in the unit that supervise. I am not her
13 attending physician.

14 Q. And how long has she been there?

15 A. I believe since about May of 1975, somewhere
16 around there, maybe even longer.

17 Q. All right.

18 A. Several months.

19 Q. And is she suffering severe physical disabilities?

20 A. I don't think she has. I think her physical
21 disabilities are not -- the main problem is her mental
22 disability.

23 Q. Pardon?

24 A. Her mental disability is the main problem. I'm not
25 aware that she has severe physical problems. When she came to

1 the hospital she was in a body cast as a result of a back
2 injury, but, to my knowledge, that is fairly well healed.

3 Q All right. And when was she brought into the
4 Oregon State Hospital?

5 MR. REMAKLUS: I'm going to object on the ground it's
6 outside the scope of direct examination.

7 THE COURT: Yes, I'm going to sustain the objection
8 unless there's a connection shown.

9 MR. ROBINSON: Your Honor, I will cease my
10 cross-examination at this time and ask Dr. Treleaven to keep
11 himself available for certain rebuttal.

12 THE COURT: All right.

13 You are going to stop on that point, or are you
14 finished with your cross?

15 MR. ROBINSON: I'm finished with my cross, yes,
16 Your Honor.

17 MR. REMAKLUS: Just one moment.

18 I have no further questions.

19 Thank you, Doctor.

20 THE COURT: All right, you will have to remain to be
21 called again as a defense witness.

22 THE WITNESS: Yes, Your Honor.

23 MR. THOMAS: Call Detective Bladow, please.
24
25

1 EMIL F. BLADOW,
2 called as a witness on behalf of the State, being first duly
3 sworn for rebuttal examination, took the stand and testified
4 as follows:

5
6 DIRECT EXAMINATION

7 BY MR. THOMAS:

8 Q Mr. Bladow, would you state your name and address,
9 please.

10 A My first name is Emil, E-m-i-l, F. Bladow,
11 B-l-a-d-o-w. My address is 7555 Southwest Lara, Portland,
12 Oregon.

13 Q Where are you employed, sir?

14 A City of Portland Police Department.

15 Q Were you employed in the Portland Police Department
16 in August of 1974?

17 A Yes, I was.

18 Q And during that month did you have occasion to
19 be called to the scene of a homicide at St. Mark's Episcopal
20 Church in Portland?

21 A Yes, I did.

22 Q On what date was that? Do you recall?

23 A It was August the 17th, 1974, approximately
24 10:15 p.m.

25 Q And was that in connection with your duties in the

1 Portland Police Department?

2 A. Yes. I was called to that location, to the
3 church, because a body had been discovered on the second floor
4 of the church.

5 Q Were you in the Homicide Bureau of the Portland
6 Police Department?

7 A. I'm assigned to the Homicide detail.

8 Q What did you find when you arrived at the church?

9 A. We found a body of a male subject lying on a bed
10 located in the sexton's quarters on the second floor of the
11 church.

12 Q And did you at any time subsequent thereto,
13 identify the person whose body was there in the church?

14 A. The person was later identified to be a
15 William Joseph Dean and he was identified by fingerprints.

16 Q I will just ask you, Mr. Bladow, to tell us your
17 rank in the Police Department.

18 A. I'm a Detective with the Portland Police Department,
19 assigned to the Homicide detail.

20 MR. THOMAS: I have no further questions.

21 MR. ROBINSON: I have no questions at all, Your Honor.

22 THE COURT: All right. You may step down.

23 MR. ROBINSON: That witness may be excused as far as
24 we're concerned.

25 MR. THOMAS: Thank you.

1 THE COURT: All right, you may leave if you wish to.

2 THE WITNESS: Thank you.

3 MR. REMAKLUS: Your Honor, we have two more witnesses
4 and we are advised that the aircraft is late into Spokane.
5 They should be on their way into Wallace now. We would,
6 therefore, ask for a recess until they arrive.

7 THE COURT: All right, we'll take a recess, ladies and
8 gentlemen. If you remember the admonition, don't discuss the
9 case and keep your minds open.

10 (Recess taken.)

11 THE COURT: Show the jurors are all present.

12 Call your next witness.

13 MR. REMAKLUS: I'd like to recall Dr. Treleaven, please,
14 Your Honor.

15

16 JOSEPH HERBERT TRELEAVEN,
17 called as a witness on behalf of the State on further rebuttal
18 examination, having been previously duly sworn, took the stand
19 and testified further as follows:

20

21

22

23

24

25

1 FURTHER DIRECT EXAMINATION

2 BY MR. REMAKLUS:

3 Q Doctor, at the time the defendant was in the
4 Oregon State Mental Hospital and at the time of your evaluation
5 of him, did he suffer from any mental disease or defect which
6 would interfere with his capacity to appreciate the wrongfulness
7 of his conduct?

8 A No, in my mind he did not.

9 Q At that time did the defendant have the capacity
10 to conform his conduct with the requirements of law?

11 A Yes, in my opinion he did.

12 Q Did he have the ability at that time to differentiate
13 between right and wrong?

14 A It's my belief that he did.

15 Q Now, you have described his antisocial conduct and
16 I wish to ask you whether or not such antisocial conduct would
17 interfere with his capacity to appreciate the wrongfulness of
18 his own conduct?

19 A No, I don't believe it does.

20 Q Did the defendant's antisocial conduct at that
21 time interfere with his ability to conform his conduct with the
22 requirements of law?

23 A Give me that again, would you, please. I got lost.

24 Q Did the defendant's antisocial course of conduct
25 interfere with his ability to conform his conduct with the

1 requirements of law?

2 A. No, I don't believe it did, no.

3 MR. REMAKLUS: I have no further questions.

4
5 RECROSS EXAMINATION

6 BY MR. ROBINSON:

7 Q Dr. Treleaven, you testified that in the history
8 that you took of Tom Creech he had advised you that he had been
9 on trial for murder in March of 1974; isn't that correct?

10 A. I believe that it is, yes.

11 Q And that was approximately one month prior to your
12 evaluation; isn't that correct?

13 A. To the best of my knowledge, yes.

14 Q What depth of inquiry did you go into in your
15 examination of Thomas Eugene Creech at that time to determine
16 how extensive this antisocial behavior pattern had taken in
17 regards to Tom's abilities to understand the wrongfulness of
18 his acts?

19 A. Now, I'm lost. Would you give me that again,
20 please.

21 Q You had the information that we just related to
22 you.

23 A. Yes.

24 Q How deeply did you go into it, as a psychiatrist,
25 in your examination of Thomas Eugene Creech?

1 A. Well, I did the best that I could to understand his
2 life pattern and his personality functioning, way back as far as
3 we could go.

4 Q. But, specifically on the murder that is supposedly
5 he was involved in in Tucson, Arizona, to what depth did you go
6 into that?

7 A. I didn't discuss it with him beyond the fact that
8 he was acquitted.

9 Q. Did you feel at that time, while you were examining
10 Tom Creech -- this is in April of 1974 that he was a person that
11 was crying for help?

12 A. No, I did not feel that.

13 Q. Did you feel that there was some other purpose or
14 reason that he had in being there in the Oregon State Mental
15 Hospital?

16 A. Well, he was there because the Judge had sent him
17 and I believe that one of the statements that he made was that
18 he didn't think he needed to be there.

19 Q. All right. And, then, you further examined him,
20 you say, in May, May 24th through June the 20th of 1974?

21 A. The only personal examination I performed during
22 that period was when he came before the Hospital Disposition
23 Board; of which I am the Chairman. The rest of the time in the
24 hospital he was under the care of other physicians between
25 May the 24th and June the 20th.

1 Q And that was a voluntary commitment?

2 A No, I think it was a civil commitment as a mentally
3 ill person.

4 Q All right. A civil commitment means what to you in
5 Oregon?

6 A Well, in Oregon, like most states, if somebody is
7 thought to be mentally ill and two people sign a statement to
8 that effect then the Court having jurisdiction calls a hearing
9 in which the person is examined by at least two professional
10 mental health people; at least one of whom has to be a physician.
11 If they find that the person is mentally ill and in need of
12 care or treatment, or dangerous to themselves or others, then
13 they are sent to the hospital for treatment.

14 Q And this was the reason that you understand
15 Tom Creech was sent back to the hospital in May of 1974?

16 A That's correct.

17 Q And on civil commitments, are they given weekend
18 passes?

19 A Usually, yes.

20 Q To your knowledge, during that period of time was
21 Tom Creech given weekend passes?

22 A I understand that he was.

23 Q During that period of time did you come to a
24 determination that Thomas Eugene Creech was dangerous to himself
25 and to others?

1 A I did not personally, no.

2 Q Why?

3 A During that period of time, if you are talking
4 between the 24th of May and the 20th of June, he was not under
5 my personal care. I guess, when he came before the Hospital
6 Disposition Board as one of the voting members and the Chairman,
7 I determined that he was not dangerous to other people to the
8 point that he could not be moved off the maximum security ward.

9 Q And that was, even with your prior information
10 gained from your own individual examination and analysis
11 earlier, some two, three months earlier in April?

12 A That's correct.

13 MR. ROBINSON: Your Honor, that does complete my
14 cross-examination and I would like to go beyond the scope of
15 direct examination just in cooperation with the Doctor's
16 schedule, if I may at this time.

17 THE COURT: Any objection?

18 MR. REMAKLUS: We have no objection.

19 THE COURT: Just so the record is clear, Mr. Robinson,
20 as I understand you are putting on, now, the Doctor's testimony
21 as you would if you had called him on your surrebuttal, is that
22 right?

23 MR. ROBINSON: Yes, Your Honor.

24 THE COURT: Your own witness from this point forward?

25 MR. ROBINSON: Yes, sir.

1 THE COURT: Before we start that, there's -- see if the
2 State has any redirect on the cross of this witness.

3 MR. REMAKLUS: No, Your Honor, we have no more redirect.

4 THE COURT: You are finished with the witness as far as
5 you are concerned?

6 MR. REMAKLUS: Yes, Your Honor.

7 THE COURT: We are now proceeding with the witness now
8 as your own witness, Mr. Robinson, on your surrebuttal out of
9 order?

10 MR. ROBINSON: Yes, Your Honor.

11 THE COURT: You understand, ladies and gentlemen, once
12 the State finishes with its rebuttal evidence, which we've
13 been hearing, then the defendant has a right to put on what we
14 call surrebuttal in response to any evidence -- any evidence in
15 the State's rebuttal.

16 We're doing this a little out of order as we did
17 once before rather than make the Doctor come back on the
18 defendant's surrebuttal, we're just going to let him go into
19 that testimony right now as the defendant's own witness on
20 surrebuttal.

21 Go ahead, Mr. Robinson.

22

23

24

25

1 JOSEPH HERBERT TRELEAVEN,
2 called as a witness on behalf of the defendant for surrebuttal
3 examination, having been previously duly sworn, took the stand
4 and testified as follows:

5
6 DIRECT EXAMINATION

7 BY MR. ROBINSON:

8 Q Dr. Treleaven, I previously started to ask you
9 some questions regarding Tomisene Creech. I believe you had
10 testified that she was at the Oregon -- and is it the Oregon
11 State Hospital?

12 A That's correct.

13 Q In Salem; is that correct, sir?

14 A That's correct.

15 Q In my discussion with you during that recess,
16 Doctor, did you not advise me that under Oregon law the
17 privilege between doctor and patient would prevent you from
18 going into any detail regarding Tomisene Creech and her care,
19 doctoring and such?

20 A Yes. It is my responsibility to keep information
21 about our patients confidential; whether it's proper for the
22 Court to overrule me or not, I don't know. But, I have to
23 assert that responsibility.

24 Q All right; and Doctor, were I to propound question
25 after question to you, would you find it necessary to insert that

1 privilege on behalf of yourself and Tomisene Creech?

2 A Well, the privilege is on behalf of Tomisene Creech.
3 It's not my privilege, it's my duty to honor that privilege.

4 Q All right. Now, was Tomisene Creech brought to the
5 Oregon State Hospital in a body cast suffering from physical
6 injuries?

7 MR. REMAKLUS: Object on the ground that it's not
8 probative of any of the issues of this case, Your Honor.

9 THE COURT: Overruled.

10 THE WITNESS: Since I already stated that, I will answer
11 yes.

12 Q BY MR. ROBINSON: All right. And can you tell me
13 when it was that she was brought to the Oregon State Hospital?

14 A I can only tell you what I did before. I think it
15 was in May sometime, but I don't have her records and I'm not
16 at all sure of -- if that's accurate.

17 Q Do you recall the date of her injuries?

18 A No, I do not.

19 Q And is she presently a mentally competent person?

20 MR. REMAKLUS: I would object on the grounds that it's
21 irrelevant and immaterial.

22 THE COURT: I don't see any relevancy unless -- unless
23 this is just preliminary to something else, Mr. Robinson.

24 MR. ROBINSON: Only preliminary, yes, Your Honor.

25 THE COURT: All right. The objection is overruled.

1 THE WITNESS: Your Honor, I feel it's my responsibility,
2 because of the privilege of the patient not to discuss her
3 condition --

4 THE COURT: Well, Doctor, let me read to you what the
5 privilege is in Idaho between a physician and a patient and I
6 appreciate our Idaho law may not be the same as Oregon and
7 probably isn't. But, the statute in Idaho on the patient-doctor
8 privilege reads as follows:

9 "A physician or surgeon cannot, without the consent
10 of his patient, be examined in a civil action as to any
11 information acquired in the attending of the patient which was
12 necessary to enable him to prescribe or act for the patient."

13 By that, and it has certain exceptions, exception
14 in the case of physical injury to children, exception in the
15 case of death of a patient, exception in the case of an action
16 by higher or representatives to recover for personal action.

17 Now, our Supreme Court has interpreted this literally
18 in accordance with the language of the Statute that the privilege
19 doesn't extend to criminal cases. So, as far as Idaho law, I'd
20 have to rule your privilege doesn't cover your patient in this
21 particular action; being a criminal action and not a civil
22 action.

23 THE WITNESS: Well, Your Honor, I'm certainly not an
24 attorney and I really can't quote what the Oregon law is, but
25 I would be willing to answer questions if you so order me.

1 THE COURT: All right, I'll order you to answer under the
2 Idaho law, since that's what we are covering now.

3 MR. REMAKLUS: Your Honor, we would prefer that an offer
4 of proof be made to show the relevancy of this before --

5 THE COURT: Well, I think I can recognize where it may be
6 relevant. We have had prior testimony in this case about
7 Tomisene.

8 MR. REMAKLUS: Thank you, Your Honor.

9 THE COURT: It will have to relate some way to that
10 testimony to be relevant, Mr. Robinson.

11 MR. ROBINSON: Yes, Your Honor, I intend to tie that in.

12 THE COURT: Yes.

13 Q BY MR. ROBINSON: Doctor, my question was, is
14 Tomisene Creech presently suffering from mental disorders to the
15 extent that she is a mentally incompetent?

16 A She is presently suffering from mental disorders,
17 now, I think I have to qualify as to what, because there are
18 many differences, incompetent like to sign a will, to enter a
19 marriage, to be criminally responsible. So, incompetent as to
20 what?

21 Q All right. And what is her mental disorder?

22 A It's my understanding that she is suffering from
23 chronic schizophrenia.

24 Q And what is that?

25 A It's a severe mental disorder which is most

1 characterized by a person's loss of touch with reality so that
2 they live and feel and act as if they were in an unreal world,
3 sort of like we do when we're in a dream state. It can be a
4 very serious mental disorder.

5 Q And has Tomisene Creech, in the past, been a severe
6 addict and user of narcotics?

7 MR. REMAKLUS: I'm -- may I ask a question or two in aid
8 of objection, Your Honor?

9 THE COURT: Yes.

10 MR. REMAKLUS: Doctor, did you personally make the
11 evaluation on Tomisene Creech?

12 THE WITNESS: No, I did not.

13 MR. REMAKLUS: I would object.

14 THE COURT: Yes, I'm going to sustain the objection unless
15 a foundation is laid as to the basis of knowledge.

16 MR. ROBINSON: All right.

17 Q BY MR. ROBINSON: Doctor, what is the total basis of
18 the knowledge that you have regarding the history of
19 Tomisene Creech?

20 A Well, my knowledge is based on the fact that I have
21 been called from time -- mainly to attend to her treatment when
22 the physician who was primarily looking after her is gone. So,
23 I have not really gone in and studied thoroughly all of her
24 history and I'm not exceedingly well acquainted with her case.

25 Q Have you been a consulting physician and psychiatrist

1 on her case?

2 A. Well, I don't think that's the appropriate term.
3 I'm supervisor of the unit where she is being treated by a
4 physician that's under my supervision.

5 Q All right. Would you describe to us the extent of
6 the knowledge that you do have of her background and history
7 symptoms.

8 A. Well, all I can say is it's pretty sketchy. I
9 have never sat down and read her case from cover to cover and I
10 don't think I've ever read the entire case history.

11 Q What do you know of her case? What factual
12 information do you have?

13 MR. REMAKLUS: I would object on the grounds that no
14 foundation is laid, Your Honor.

15 THE COURT: Yes, I'm going to sustain the objection.
16 That isn't relevant here. You've got to get it down to a point
17 of relevancy, Mr. Robinson.

18 MR. ROBINSON: All right.

19 Q BY MR. ROBINSON: Doctor, are you familiar with the
20 fact that Tomisene Creech was pushed from a four-story window?

21 MR. REMAKLUS: That is assuming facts not in evidence,
22 Your Honor.

23 THE COURT: Overruled. He's asking whether he does know
24 that.

25 THE WITNESS: All I know is that she had a fall.

1 Circumstances surrounding it I don't know.

2 MR. ROBINSON: I have no further questions of the
3 Doctor.

4 As far as I'm concerned, Your Honor, he can be
5 released.

6 MR. REMAKLUS: I have no cross-examination.

7 THE COURT: All right. You may step down and you may
8 leave if you wish.

9 We do have those original exhibits.

10 THE WITNESS: Has the copy been marked with this --

11 THE COURT: We've got it.

12 The record will show that we're releasing
13 Exhibit N to Dr. Treleaven and keeping a copy.

14 Do you want to look at this copy, Mr. Robinson, to
15 make sure?

16 MR. ROBINSON: I'm sure they are, Your Honor.

17 THE WITNESS: Yes, they appear to be in order.

18 THE COURT: Very well.

19 THE WITNESS: Thank you for your consideration.

20 THE COURT: Call your next witness.

21 MR. REMAKLUS: Jack Freeman.

22

23

24

25

1 JACK FREEMAN,
2 called as a witness on rebuttal examination by the State, having
3 been previously duly sworn, took the stand and testified as
4 follows:

6 DIRECT EXAMINATION

7 BY MR. REMAKLUS:

8 Q You are still under oath, Mr. Freeman.
9 State your name for the record, please.

10 A Jack Freeman.

11 Q Are you the Elmore County Sheriff's Detective that's
12 testified heretofore in this case?

13 A Yes, sir.

14 Q Mr. Freeman, directing your attention to the date
15 that the defendant and Carol Spaulding were placed under arrest
16 in Glenns Ferry, can you tell us what date that was?

17 A Yes, sir. I believe that was November the 8th, 1974.

18 Q And did you at any time ever -- you saw the
19 defendant at Glenns Ferry at that time as you previously
20 testified?

21 A Yes, sir.

22 Q And could you give us any idea of the amount of time
23 that you spent in the defendant's presence on the 8th day of
24 November, 1974; either -- both at Glenns Ferry, Idaho and at
25 Mountain Home, Idaho?

1 A. Yes, sir. It would -- I would have to say around two
2 hours, or possibly a little more total time.

3 Q. And was this the first time you had ever seen the
4 defendant Tom Creech?

5 A. Yes, sir.

6 Q. And this arrest, or custodial situation, was only as
7 a result of the incident that happened in Valley County, Idaho;
8 was it not?

9 A. Yes, sir.

10 Q. During the time that you spent in the presence of
11 this defendant, did you ever say to him that if he confessed to
12 these two killings that you would let Carol Spaulding go?

13 A. No, sir.

14 Q. Ever have any conversation of that nature at all with
15 him?

16 A. No, sir. The conversation that I had with him was
17 real restricted.

18 Q. And you have heretofore testified as to them; have
19 you not, Mr. Freeman?

20 A. Yes, sir.

21 MR. REMAKLUS: I have no further questions.

22 MR. ROBINSON: I have no questions.

23 THE COURT: You may step down.

24 MR. THOMAS: Call Mr. Mason.

25 THE COURT: You are still under oath, Mr. Mason.

1 ALVIN R. MASON,
2 called as a witness for rebuttal examination by the State, having
3 been previously duly sworn, took the stand and testified as
4 follows:

5
6 DIRECT EXAMINATION

7 BY MR. THOMAS:

8 Q Mr. Mason, you've previously testified. Would you
9 tell the jury your previous position of employment?

10 A I was Investigator with the Department of Law
11 Enforcement, State of Idaho.

12 Q And what are you doing now?

13 A Chief of the Bureau of Narcotics for the State of
14 Idaho.

15 Q What has been the nature of your experience and
16 background in the area of narcotics investigation?

17 A About 25 years, not all narcotics investigation,
18 however, probably several dozen cases of narcotics investigations
19 throughout my career.

20 Q Are you familiar with the value of heroin?

21 A I did price heroin, yes.

22 Q What is the value of one pound of heroin?

23 A Heroin is generally measured in kilos. One pound of
24 heroin, depending on the percentage of the heroin, 80 per cent
25 heroin would be probably worth \$150,000 to \$200,000.

1 MR. THOMAS: No further questions, Your Honor.

2
3 CROSS EXAMINATION

4 BY MR. ROBINSON:

5 Q Mr. Mason, is that street price?

6 A That's street price, yes.

7 Q And that is heroin that has only been cut 20 per cent?

8 A Yes.

9 MR. ROBINSON: I have no further questions.

10 THE COURT: Any redirect?

11 MR. THOMAS: Yes.

12
13 REDIRECT EXAMINATION

14 BY MR. THOMAS:

15 Q Mr. Mason, what do you mean by the term "street
16 price"? Would you explain that to the jury, please.

17 A The wholesale price as the heroin enters the
18 United States would be a wholesale price and this is your pure
19 heroin. Of course, it's then cut to be distributed on the street
20 and it's cut with lactose and other agents. So, the street
21 price of heroin, we're talking about the addict for taking one
22 pound of heroin and breaking it down into grams it would be worth
23 probably between \$150,000 to \$200,000.

24 Q What is a "kilo" of heroin?

25 A Kilo of heroin is 2.2 pounds.

1 MR. THOMAS: That's all I have, Your Honor.

2

3

RECROSS EXAMINATION

4

BY MR. ROBINSON:

5

Q Mr. Mason, if heroin is cut to the dangerous point of
6 5 per cent, what is the street price of a pound?

7

A About \$200,000. Most generally it's cut to about
8 6 per cent for injection.

9

Q And the wholesale price?

10

A About -- not over \$100,000.

11

Q That is to the true owners?

12

A To the true what?

13

Q That's the value to the true owners?

14

A Yes.

15

MR. ROBINSON: I have no further questions.

16

MR. THOMAS: No redirect, Your Honor.

17

THE COURT: You may step down.

18

MR. REMAKLUS: Call Mr. Woodall.

19

THE COURT: You are still under oath.

20

MR. WOODALL: Yes, sir.

21

22

WESLIE WOODALL,

23

called as a witness for rebuttal examination by the State,

24

having been previously duly sworn, took the stand and

25

testified as follows:

DIRECT EXAMINATION

BY MR. REMAKLUS:

Q State your name again, please, for the record.

A Weslie Woodall.

Q Mr. Woodall, you've already testified you are an Investigator for the State. In your duties as State Investigator, do you travel in Idaho extensively?

A Yes, I do.

Q Would you travel the north-south highway between Lewiston and Donnelly extensively?

A Yes, I do.

Q Now, by that, I mean from Lewiston to New Meadows on U.S. Highway 95 and then from New Meadows on through McCall and Cascade on Highway -- State Highway 55. Are you familiar with that route?

A I have traveled it many times.

Q Do you know how far it is from Lewiston to Donnelly, Idaho by that route, Mr. Woodall?

A Yes.

Q How far is that?

A If you go from Lewiston on Highway 95 to Grangeville, from Grangeville to New Meadows, New Meadows to McCall, McCall to Donnelly would be approximately 180 miles.

Q And is there another -- well, no, this is the route that we're interested in.

1 Now, you are familiar with the road and the
2 characteristics of the road; are you not, on that route that
3 you have described?

4 A. Yes, I am.

5 Q Could you give us an estimate of driving time from
6 Lewiston to Donnelly, Idaho if you are going to drive straight
7 through?

8 A. Driving the speed limit and at approximately 55 miles
9 an hour, it would take a good four hours.

10 Q And would you describe the characteristics of the
11 route and the road from Lewiston on to Donnelly?

12 A. The road would be described as mountainous, a lot of
13 curves, a lot of turns and generally -- most of the road would
14 be considered a narrow highway.

15 Q Mr. Woodall, do you know whether or not, prior to
16 November 3rd, 1974, that Whitebird Hill -- you still had to go
17 over the switchbacks?

18 A. Yes, you did. It was not done until 1975.

19 Q And the new road was not open?

20 A. Right.

21 Q So, it was slow road still there?

22 A. Yes.

23 MR. REMAKLUS: I have no further questions.

24 MR. ROBINSON: No questions, Your Honor.

25 THE COURT: You may step down.

1 MR. THOMAS: Your Honor, at this point we have the
2 tendered document that the Court has discussed previously which
3 we are offering at this time.

4 THE COURT: Well, we will take that up after the noon
5 recess. We will take our noon recess until -- how much more
6 rebuttal do you have?

7 MR. THOMAS: None.

8 MR. REMAKLUS: I think we're completed.

9 THE COURT: You think this is all you have?

10 MR. REMAKLUS: Yes.

11 THE COURT: Do you have some surrebuttal, additional
12 surrebuttal, other than what you've taken out of order?

13 MR. ROBINSON: Only the motion, Your Honor, for admission
14 of documents.

15 THE COURT: Is that all you'll have?

16 MR. ROBINSON: That's all.

17 THE COURT: We're going to give you a longer than usual
18 recess at noon today because of the state of the case right now,
19 ladies and gentlemen. So, I think before we release you for
20 your noon recess I want to just take a short recess and talk to
21 Counsel about our further proceedings in the case and, then, we
22 will tell you how long you'll have for a noon recess.

23 So, if you will abide by the admonition, don't
24 discuss the case and keep your minds open.

25 (Jury left the courtroom.)

1 THE COURT: It seems to me most of these matters could
2 be taken up out of the presence of the jury and, then, just
3 simply presented, the results presented to the jury as an
4 accomplished fact; whatever we decide on those matters and I'm
5 wondering if then Counsel are anticipating that we can then go
6 right into instructions after we've reviewed those and also
7 review those during the noon recess for the jury, at least.

8 MR. ROBINSON: Yes, I'm sure we can.

9 THE COURT: Let's have Counsel come back earlier than
10 usual and take up some of these matters.

11 MR. REMAKLUS: Yes, that's satisfactory.

12 THE COURT: We could then settle the instructions and
13 I suppose Counsel have any reason why we can't go right ahead
14 and instruct the jury and, then, have closing arguments, at
15 least start closing arguments, we might --

16 MR. ROBINSON: No reason that we have, Your Honor.
17 As a matter of fact we would prefer it if we could carry it
18 through until completion.

19 THE COURT: Well, if Counsel -- I don't want to cut your
20 lunch too short, but if Counsel could come back, say, at 1:00
21 will that give you enough time, 1:15, maybe.

22 MR. ROBINSON: 1:15, Your Honor.

23 THE COURT: And, then, we'll have the jury come back at
24 2:00.

25 MR. REMAKLUS: Yes, Your Honor.

1 THE COURT: See if we can't get these other matters taken
2 care of before 2:00.

3 MR. ROBINSON: All right, sir.

4 THE COURT: Bring the jury back.

5 (Whereupon the jury re-entered the courtroom and
6 were released for lunch until 2:00.)
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1 WALLACE, IDAHO, TUESDAY, OCTOBER 21, 1975, 1:15 P.M.

2
3
4 THE COURT: State have any additional rebuttal?

5 MR. THOMAS: Simply have, Your Honor, this document to be
6 introduced as -- this is a portion of Exhibit 49. I don't know
7 how the Court wants to mark it, so we haven't had it marked for
8 identification purposes.

9 That is the portion that has been cut out of
10 State's Exhibit 49; which I believe corresponds with the offer
11 the defendant has made as Defendant's Exhibit M.

12 THE COURT: Do you have a copy of this --

13 MR. ROBINSON: Yes, I do, Your Honor.

14 THE COURT: -- excerpts from 49?

15 MR. ROBINSON: It was my understanding that the Court
16 was going to mark that 49-A.

17 THE COURT: Yes. All right, to keep 49 intact for
18 purposes of keeping the record intact as to the Motion in Limine
19 that was previously argued regarding that Exhibit and the
20 limitation of that Exhibit by eliminating the matters that were
21 objected to by the defendant, we will mark the excerpt as 49-A.

22 (State's Exhibit 49-A marked for identification.)

23 THE COURT: I think the record may have become somewhat
24 uncertain in regard to this Exhibit and the Defendant's Exhibit
25 that was deemed marked M because of the presenting of some

1 rebuttal testimony by the State out of order. I think the
2 record reflects that at the time the defendant has no further
3 witnesses to present on Friday the State was then permitted to
4 put on some evidence out of order in rebuttal.

5 I think they called Mr. Hilby and at the same time
6 they offered what we've now marked as 49-A; which was the
7 excerpt from 49. I think the record reflects that at that
8 time Counsel entered into a stipulation, at least Mr. Thomas
9 presented a stipulation with regard to the submission of what
10 we have now marked as Exhibit 49-A. I had -- because of the
11 uncertainty, I had the Court Reporter type up the exchange that
12 took place at that time. I asked "Do you have any further
13 rebuttal you want to put on out of order?"

14 Mr. Thomas stated at that time "Not at this time,
15 Your Honor. I think that we have arrived at a stipulation with
16 regard to the submission of a documentary exhibit; but we would
17 not have any further witnesses at this time on rebuttal."

18 Then Mr. Robinson, "I'd just as soon do it now if
19 the Court wants to take the time."

20 And I -- "The Court: It's all right with me."

21 "Mr. Thomas: We have no objection to doing that;
22 it's just that the material that we wanted to extract from here
23 and that we regarded be the subject of the stipulation, needs
24 to be cut out of the rest of the document and we haven't got
25 that done at this point."

1 "Mr. Robinson: Your Honor, I have examined that
2 material and I understand that the Court is going to give an
3 instruction to go along with the admission of this material
4 relating to the transcript from a tape between Mr. Creech and
5 Sheriff Palmer.

6 "At this time we would stipulate that that excerpt
7 from that document be admitted with the Court's instruction to
8 the jury as to how it should be treated."

9 "The Court: Very well."

10 "Mr. Robinson: And we can actually do the physical
11 submission of that and the Court's instruction at a later time
12 if the Court so desires."

13 "Mr. Thomas: We would like to read it in, then.
14 It would cover the material that's on the tape submitted --
15 edited tape submitted."

16 "The Court: Was the stipulation that the transcript
17 could be made part of the record and not the edited tape; is
18 that it?"

19 "Mr. Robinson: Yes, Your Honor."

20 "Mr. Thomas: That's correct."

21 "The Court: That would be, probably, easy to read
22 it in if you want."

23 "Mr. Thomas: If I may have just a moment."

24 "The Court: If you are sure you agree on which parts
25 are going to be on the edited copy."

1 "Mr. Thomas: Yes, Your Honor.

2 "Your Honor, rather than read it in, we'll simply
3 cut it out and submit it without reading it into the record if
4 that would be -- "

5 "The Court: So the jury will be able to identify
6 it later on in relation to the record and the Court's instructions;
7 as I understand, you are talking about Exhibit 49, is that
8 right?"

9 "Mr. Thomas: That's correct, Your Honor."

10 "The Court: Did you want to identify for the
11 record what the statement is?"

12 "Mr. Thomas: The statement relates to the interview
13 of E.C. Palmer with Thomas E. Creech dated 4-28-1975; a
14 typewritten transcript of the tape recorded conversation made
15 on that tape."

16 "The Court: All right.

17 "As to this particular Exhibit, ladies and
18 gentlemen, I'm going to instruct you that first, this is still
19 part of the State's rebuttal; you understand they are putting on
20 out of order at this point, it isn't part of the defendant's
21 case.

22 "I'll instruct you that this statement is being
23 admitted for a limited purpose only. I will again remind you
24 of this limited purpose in my instructions, but at this time I
25 would advise you that this particular statement may not be

1 considered by you as proof of the defendant's guilt; but may be
2 considered by you only as it bears on the credibility of the
3 defendant as a witness when he testified on the witness stand."

4 Now, my understanding from that exchange is that
5 49-A has, actually, been admitted at this time by stipulation
6 as part of the State's rebuttal.

7 MR. ROBINSON: That's my understanding, yes, Your Honor.

8 THE COURT: All right. Then, I think before the State
9 had closed its rebuttal the defendant then moved to offer the
10 entire Exhibit 49 and withdrew prior objections, is that right,
11 Mr. Robinson?

12 MR. ROBINSON: Yes.

13 THE COURT: And to try to keep the defendant's offer
14 separate from the State's, we had 49 deemed marked Defendant's
15 Exhibit M at this point as a defendant's Exhibit; although we
16 didn't have a separate actual document to so mark.

17 Now, it seems to me at this point, on further
18 reflection, that that was premature because 49-A was, really,
19 admitted as part of the State's rebuttal and it wouldn't be
20 appropriate to offer anything in surrebuttal until the State had
21 closed its rebuttal.

22 So, I think perhaps at this point it would be, at
23 least for you, to -- better for you to make a record at this
24 point if the State is ready to close its rebuttal now that 49-A
25 has been admitted clearly for the record.

1 MR. REMAKLUS: Yes, State's rebuttal is closed.

2 THE COURT: Were you to make whatever you want to at this
3 time, Mr. Robinson.

4 MR. ROBINSON: All right, Your Honor, and I do move that
5 that which has been marked and deemed marked as Defendant's
6 Exhibit M, previously having been marked as State's Exhibit
7 No. 49, be admitted. The record should reflect that there has
8 been a short bit of conversation between Counsel and the Court
9 in chambers and I am, along with the thinking of the Court,
10 that there are some areas of immateriality in that which has
11 been marked Defendant's Exhibit M that should be excised and
12 deleted from the admitted -- or that which we moved to be
13 admitted.

14 THE COURT: All right. Do you have any objection to the
15 balance of 49?

16 MR. THOMAS: Yes, Your Honor.

17 THE COURT: Which is deemed marked M?

18 MR. THOMAS: Simply --

19 THE COURT: The jury is ready to come into the room, if
20 we just stand at ease for a minute until they come in.

21 (Jurors passed through the courtroom and entered
22 the jury room.)

23 MR. THOMAS: We'd just repeat our objection to any
24 immaterial portions of the remainder of the document not
25 relating to this case.

1 THE COURT: As I understand the objection that was
2 interposed that you refer to as "the same objection" when this
3 same offer was made, perhaps prematurely, was irrelevancy?

4 MR. THOMAS: That is correct, and going only to those
5 matters in the remainder of the Exhibit 49 which does -- or do
6 not relate to the case on trial.

7 THE COURT: I think at that time I sustained that
8 objection without comment. I've since reconsidered that and
9 in the manner which it is now offered. I'm going to sustain
10 the objection in part and overrule it in part.

11 I feel it would be appropriate to admit all other
12 portions of Exhibit 49 which has also been deemed marked
13 Defendant's Exhibit M that are consistent with prior testimony
14 of the defendant to bear just as 49-A bears on his credibility
15 and not for the truth of the matter, or to prove guilt or
16 innocence.

17 Now, that's going to take some more editing. What
18 the intent of my ruling is that all matters that relate to
19 Mr. Creech's prior testimony that are consistent with that
20 should be admitted.

21 MR. ROBINSON: Yes, that's my understanding and our
22 desire in the offer, Your Honor.

23 THE COURT: And any matters that are outside of his
24 prior testimony and are not related to it, I would sustain as
25 being irrelevant.

1 Now, there maybe are some points of dispute on that.
2 I'm wondering if, perhaps, Counsel themselves can agree on the
3 majority of it and, if they have some areas of dispute perhaps
4 let the Court resolve it; whether it's relevant or irrelevant.

5 MR. ROBINSON: Fine, Your Honor, I'm sure if we could
6 have 15 or 20 minutes to go over it we could excise that
7 material which we feel, together, is irrelevant.

8 THE COURT: Very well.

9 MR. ROBINSON: And, then, submit it to the Court and see
10 where we stand.

11 THE COURT: Very well. One other matter, then, we
12 would take up at this time and, perhaps Counsel would want a
13 recess to consider this matter.

14 The instructions. Now, I have copies here for
15 Counsel to look at. Counsel want to come up and pick them up.

16 These instructions, in major part, were reviewed
17 by Court and Counsel on Saturday. I will advise Counsel just
18 for purposes of speeding up their review of these instructions
19 that I have added the two instructions that Mr. Robinson had
20 requested that I indicated I was going to add, put the one
21 sentence -- add one sentence to the instruction on admissions
22 and confessions and also the requested instruction on motive.

23 Now, I've also added three new ones that we didn't
24 discuss.

25 I've added one on the female gender because we had

1 female witnesses; which is just a standard instruction that the
2 male refers to the female.

3 We discussed an instruction on other crimes. I've
4 formulated such an instruction and it is in that set now.

5 I've added one instruction on accomplice that just --
6 I think a previous set of instructions on accomplice were
7 admitted in one of the standard instructions on accomplice but,
8 unless an accomplice has guilty knowledge and intent, unless an
9 alleged accomplice has guilty knowledge and intent, he isn't an
10 accomplice; which is the instruction from the California set
11 and I've added that so that there are, basically, three -- or
12 two that we didn't discuss and, then, we did discuss the other
13 crimes instruction that I have formulated and put in.

14 So, if Counsel want to go over these now for a few
15 minutes, why, then, we'll take a recess.

16 MR. THOMAS: Yes, Your Honor.

17 MR. REMAKLUS: Thank you.

18 (Recess taken.)

19 THE COURT: All right, Mr. Robinson, what's your
20 position now on Exhibit 49?

21 MR. ROBINSON: Deemed marked as Defendant's Exhibit M,
22 Your Honor?

23 THE COURT: Yes.

24 MR. ROBINSON: We desire that the document in its entirety
25 be admitted into evidence without any deletions, interlineations

1 or extractions taken therefrom as far as that Exhibit is
2 concerned.

3 We already, of course, have settled 49-A?

4 THE COURT: Yes. Mr. Remaklus?

5 MR. REMAKLUS: Well, since Exhibit 49 is going in its
6 entirety, it appears that the instruction concerning Exhibit
7 49-A would be a little bit misleading, Your Honor, because 49
8 contains 49-A.

9 THE COURT: Well, I would say that if 49 goes in in its
10 entirety we would just send 49 to the jury and not 49-A.

11 MR. REMAKLUS: Then we would remove the instruction?

12 THE COURT: The instruction would refer to 49, not 49-A.

13 MR. REMAKLUS: But the instruction will still apply to
14 the Exhibit?

15 THE COURT: 49, yes, but not 49-A.

16 MR. REMAKLUS: All right.

17 THE COURT: Well, all right, I'm going to -- if that's
18 your desire, Mr. Robinson, I'm going to admit the entire
19 Exhibit 49.

20 MR. ROBINSON: All right, sir.

21 THE COURT: And for the record, then, I don't see any
22 purpose in having it any longer referred to as Exhibit M because
23 I felt 49 had to be distinguished from your Exhibit because I
24 didn't think 49 was going in intact. I thought it would be
25 going in piecemeal and we'd still have to maintain 49 intact.

1 But, as long as 49 is going in intact without it being excerpts
2 or anything else from it, that it seems to me that 49-A need not
3 go to the jury as a separate Exhibit and we'll leave it in the
4 record to -- for identification for the record purposes, but 49
5 is the only Exhibit that should go to the jury and it shouldn't
6 be remarked "M" then.

7 MR. ROBINSON: I would agree with the Court.

8 THE COURT: Well, just for the record --

9 MR. ROBINSON: Submitting only 49 with the instruction
10 and not putting in 49-A?

11 THE COURT: The instruction then I propose to apply to
12 49-A will apply to 49.

13 MR. REMAKLUS: That's agreeable, Your Honor.

14 THE COURT: In its entirety.

15 Very well.

16 MR. ROBINSON: With that, Your Honor, the defense rests
17 and has no further surrebuttal.

18 THE COURT: I assume you will want to make this record
19 in the presence of the jury so they'll know what happened just
20 in terms of offering as part of your surrebuttal Exhibit 49.

21 MR. ROBINSON: Yes, Your Honor.

22 MR. THOMAS: Yes, Your Honor. I take it that matter will
23 be presented to the jury as though the Exhibit 49 were being
24 presented in its entirety and this has been overruled?

25 THE COURT: Right. I think it would be appropriate for

1 me to admonish the jury the same as I did with 49-A was admitted
2 by stipulation but it's admitted for limited purposes. Since
3 49-A was admitted in their presence, it might be well to advise
4 them that 49 will actually duplicate in part and, therefore,
5 replace 49-A as an Exhibit.

6 All right. May the record show the proposed
7 instructions have been furnished to you for examination,
8 Mr. Remaklus, Mr. Thomas?

9 MR. REMAKLUS: Yes, it may.

10 THE COURT: Do you have any objections you wish to state
11 at this time for the record?

12 MR. THOMAS: Yes, we have just one. On the instruction
13 related to premeditation. We believe that the instruction should
14 include a phrase to the effect that premeditation may occur in
15 such a short time as successive thoughts permitted. Beyond that
16 we have no objection.

17 THE COURT: Do you have any requested instructions you
18 feel have been omitted that you want put in?

19 MR. THOMAS: No, Your Honor.

20 THE COURT: All right. What's your position on that
21 request that I amend the instruction on premeditation?

22 MR. ROBINSON: I feel that that is covered, Your Honor;
23 that the wording of that instruction already clearly defines
24 that to the jury by the wording that is there and I would object
25 to any further attempt of explanation.

1 THE COURT: Yes, I'm going to allow the present
2 instruction to stand, then. I'll overrule the objection.

3 May the record show the proposed instructions have
4 been furnished to you for examination, Mr. Robinson?

5 MR. ROBINSON: Yes, they have, Your Honor; both on
6 Saturday and again today.

7 I would like to make this a matter of record; that
8 I did submit other matters to the Court and after closely
9 scrutinizing all that the Court proposes to give, instructions
10 now, I feel that each and every item that I submitted to the
11 Court has been covered and covered adequately in the instructions
12 the Court desires and is going to give.

13 I have no objection to any particular instruction
14 that appears in this group.

15 THE COURT: Do you have any additional instructions you
16 wish given?

17 MR. ROBINSON: No, Your Honor, I do not.

18 THE COURT: How long do Counsel want to argue? My
19 purpose isn't to limit you in any way, but to try to keep you
20 even so there won't be a great inequality in amount of time.

21 MR. REMAKLUS: The State doesn't request any longer than
22 two hours, Your Honor.

23 THE COURT: Mr. Robinson?

24 MR. ROBINSON: I would adhere to that, Your Honor.

25 THE COURT: All right, two hours, then, to each side.

1 That means the State will have to reserve time out of their
2 total two hours for rebuttal.

3 MR. REMAKLUS: Yes, Your Honor.

4 THE COURT: And if you want -- the State wants to divide
5 the argument, the time will run against both of you; you
6 understand that?

7 MR. REMAKLUS: Yes, we understand that.

8 MR. THOMAS: Thank you, Your Honor.

9 THE COURT: I'm going to allow Counsel, just for their
10 reference and use, to keep these set of instructions they have.
11 I hope the set I have here is the same as there. I think it is,
12 all three of them. But, I would request -- ordinarily I don't
13 do this, but the instructions are rather complicated and
14 lengthy in this case so I would -- the reason I don't ordinarily
15 do it, I have had the unhappy experience of having Counsel stand
16 up and, as part of their argument, reread the complete
17 instructions to the jury that were favorable to their side and
18 I think that's improper emphasis of a particular instruction.

19 So, I'm not going to permit Counsel to do this, to
20 just read verbatim entire instructions to the jury, but I will
21 let you keep them just for purposes of making notes, or
22 purposes of argument and reference to them as to what the law of
23 the case is.

24 MR. REMAKLUS: Thank you.

25 MR. ROBINSON: May I inquire in that regard, Your Honor?

1 Since these are in our possession, is it all right
2 if he could make marks and notes on the instructions ourselves?

3 THE COURT: Well, let's see. I don't want any marks
4 on the set that goes to the jury. I ran off Xerox copies of
5 those two sets. These have many typed instructions in -- all
6 right, I'll let this set go to the jury and you can make marks
7 on the ones you have.

8 MR. ROBINSON: Thank you very much.

9 (Jury re-entered the courtroom.)

10 THE COURT: Show the jurors are all present.

11 The State may call their next witness.

12 MR. REMAKLUS: State rests, Your Honor.

13 THE COURT: Any surrebuttal, Mr. Robinson?

14 MR. ROBINSON: On the surrebuttal, Your Honor, we move
15 the admission of that which was formerly marked State's Exhibit
16 No. 49 to be admitted in its entirety and, of course, that is,
17 Your Honor, with the special instruction by the Court.

18 THE COURT: Any objection?

19 MR. REMAKLUS: No objection.

20 THE COURT: All right, I'll admit Exhibit 49 in its
21 entirety.

22 I will advise you, ladies and gentlemen, that just
23 for clarity we have previously admitted as referred to in your
24 presence, of an Exhibit No. 49 of which only a part was admitted.
25 This Exhibit now encompasses that other part that was admitted

1 so this will be the only Exhibit that will be submitted to you
2 because it includes the other part -- also the other parts that
3 we've previously referred to is included in this one Exhibit.
4 So, this will be the only Exhibit you'll get.

5 I will admonish you in respect to Exhibit 49 as I
6 did previously when the part was admitted, admitted 49-A, that
7 this Exhibit is admitted for a limited purpose only. You may
8 only consider it for the limited purposes of testing the
9 credibility of the testimony as a witness when he testified on
10 the witness stand during the trial.

11 This Exhibit is not admitted as an admission or
12 confession and must not be considered by you as evidence of the
13 truth of the facts as stated therein or as proof of the
14 defendant's guilt, but only as bearing on the credibility of the
15 defendant as a witness.

16 My written instruction will again give you the same
17 information.

18 (Whereupon State's Exhibit No. 49 admitted in its
19 entirety.)

20 THE COURT: Any further surrebuttal, Mr. Robinson?

21 MR. ROBINSON: No, Your Honor, and the defense does rest.

22 THE COURT: Both sides rest, then?

23 MR. REMAKLUS: Yes, Your Honor.

24 MR. ROBINSON: Yes, sir.

25 THE COURT: Both sides having rested, ladies and

1 gentlemen, it now becomes my duty as Judge to instruct you
2 concerning the law applicable to this case and it is your duty
3 as jurors to follow the law as I shall state it to you.

4 (Whereupon the Court instructed the jury as to the
5 law of the case.)

6 THE COURT: Counsel may now present their arguments.

7 I think we'll take a ten-minute recess before we
8 proceed with the argument.

9 Even though the evidence has been concluded,
10 ladies and gentlemen, and you've heard the instructions of the
11 Court, the case still isn't fully submitted until you've heard
12 the closing arguments.

13 So, you should still abide by the admonition, don't
14 discuss the case and keep your minds entirely open at this
15 point.

16 (Recess taken.)

17 THE COURT: Show the jurors are all present.

18 Mr. Thomas, you may proceed.

19 MR. THOMAS: Thank you, Your Honor.

20 Ladies and gentlemen of the jury: The State has the
21 opportunity to present the first of these closing arguments and
22 I'd like to spend a few moments with you reviewing some of the
23 evidence in the case.

24 I expect to be rather brief at this because I believe
25 the important points can be highlighted rather quickly.

1 The evidence in this case shows that the defendant,
2 Thomas Eugene Creech, began planning his defense at an early
3 moment, right around the time that Officer Hill turned on the
4 red and blue lights of his police patrol vehicle, shortly after
5 that on the trip to Mountain Home during which time
6 Carol Spaulding and the defendant, Thomas Creech, were riding in
7 the back of the patrol car.

8 Miss Spaulding testified to you that the defendant
9 told her, on the way up there, to invent a story about
10 self-defense and, consistently with that, Carol Spaulding told
11 Mountain Home -- an officer at Mountain Home, that the victims
12 of this crime had held the knife at the throat of Thomas Creech.

13 At the same time Mr. Creech was telling officers
14 at Mountain Home that one of the victims, Wayne Bradford, had
15 made an attempt to rape Carol. And he also said that a knife
16 had been involved and you'll find that in one of the exhibits
17 that you'll be examining when you deliberate on the facts of
18 that case, that's Exhibit No. 56; the defendant's voluntary
19 statement which was taken at Mountain Home by Officer
20 Weslie Woodall.

21 Later on Mr. Creech made the statement that this
22 was a second degree murder case and that he would plead guilty
23 to second degree murder because those people, namely Arnold and
24 Bradford had really tried to rape Carol Spaulding. That
25 information was on the statement that he made on the tape

1 recording which we played to you at an early part in the trial.

2 This, of course, is inconsistent with the idea of
3 self-defense; which is suggested by the earlier statement that
4 there had been a knife involved, or that some way or another
5 Mr. Creech had been attacked by a knife and this theory was
6 stuck to for quite awhile.

7 We submit to you that the most reliable statement
8 from Mr. Creech was the one that he gave Bud Mason shortly after
9 the plane crashed. Mr. Creech, in his testimony, doesn't
10 remember this very well, according to him, but we have an
11 Exhibit for you to examine in connection with that and that is a
12 poem which Mr. Creech wrote talking about the plane crash.
13 You'll find that among the materials you'll be examining as
14 State's Exhibit No. 68.

15 We urge you to read this poem with some care
16 because it shows a great deal of memory for the details of
17 what happened right after the plane crash and Mr. Mason told you
18 on the stand under oath that Creech had said to him at that
19 time that this upsetting and shaking experience made a
20 Christian out of him; that the jury had to convict him; that
21 there was no reason to kill those men.

22 At that point we asked the Court to take
23 judicial notice of the fact that there was only one trial
24 pending at that time and the Court took judicial notice of the
25 fact that the trial, which had been originally set to begin in

1 Cascade in May was pending against Mr. Creech at the time this
2 statement was made. That statement is obviously referable to
3 Arnold and Bradford because that was -- appears to be the only
4 case that was pending against him at that time. That's a
5 confession of murder in the first degree, taken with the other
6 evidence.

7 There are a number of things that you've heard in
8 the evidence of this case that suggest that Mr. Creech contrived
9 to confuse the issues in this case, to lie his way out of the
10 conviction for murder. In the first place, we mention the
11 attempt to persuade Carol Spaulding, a moment ago, to tell the
12 story about some self-defense while Creech and the -- Miss
13 Spaulding were being transferred from Glenns Ferry to
14 Mountain Home; which is exactly the same kind of thing that
15 Gene Hilby testified that happened in Portland after
16 William Joseph Dean was murdered by the defendant over there.
17 After Hilby and Creech had left St. Mark's Episcopal Church in
18 Portland, and driving away from there, Creech again suggested
19 the idea, ought to make up a story involving self-defense in
20 case Hilby and Creech were picked up. And things were brought
21 into court to corroborate the fact that this murder had
22 occurred in Portland. Detective Bladow, who gave you
23 information about having found the body in St. Mark's
24 Episcopal Church; furthermore, Mr. Creech admitted on the stand
25 that he had made an effort to contact Miss Spaulding during the

1 course of this very trial and had asked her to subscribe to his
2 theory that Dan and Carol Spaulding's sister, Kathy, had, in
3 fact, committed the murder in order to deprive Arnold and
4 Bradford of a pound of heroin; which was -- which was supposed
5 to have been in the back of their car.

6 We have that admission and, in addition to that,
7 among the exhibits you'll find the letter addressed from the
8 defendant to Gene Hilby which was handed to Gene Hilby in this
9 very courtroom; again claiming, in a way, with the fact that
10 Hilby was here to testify.

11 It is no coincidence that the defendant, seeking to
12 devise a new theory of self-defense sought to contact both of
13 the eyewitnesses against him and, too, the inference to be
14 drawn from that is that he attempted to support the theory
15 that he's offering here in this trial was incorrect information.

16 You also heard Sheriff Palmer testify as to a
17 number of instances during the course of Mr. Creech's
18 incarceration at the Ada County Jail where the defendant had
19 faked illnesses, faked an attempt to escape from the jail.

20 All of these things cast considerable doubt on
21 Mr. Creech's credibility as a witness in this trial as does the
22 fact that he has the most to gain by lying to you in this case.

23 There are a number of items of evidence, however,
24 which support and corroborate the information that the State
25 has given you; which corroborates what we submit to be the only

1 accurate version given by the defendant of the facts, namely
2 that version given to Bud Mason in the plane that there was no
3 reason to kill Arnold and Bradford in the first place.

4 We presented the testimony of an eyewitness,
5 Carol Spaulding, who was there. Miss Spaulding said --
6 described the events, she did not describe any attack going on
7 against her. She described the man Arnold as having been
8 getting fresh with her, as having his arm around her shoulder
9 and, then, she said that as she got out of the car Creech pushed
10 her aside and reached in with Mr. Schreiber's pistol and shot
11 Arnold once in the temple and Bradford three times in the face.

12 That's premeditation. Mr. Creech had an opportunity
13 to plan this in advance and it indicated that he thought in
14 advance about committing these killings because he had time to
15 push Carol Spaulding out of the way. He did so, that's an
16 advance move, that's a premeditated plan indicating that he was
17 about to kill these men.

18 Now, this Court's instructions that you heard a
19 few moments ago about premeditation indicates that the amount
20 of time in which one forms premeditation is not that significant.
21 What counts is the intent in advance to kill someone. That's
22 what we have in this case.

23 Mr. Creech doesn't have to be shown to have sat
24 down for an hour in advance and devised a plan to kill Arnold
25 and Bradford. This evidence, I submit, indicates that this was

1 a premeditated killing.

2 It was also a killing of malice aforethought because
3 Creech intended to unlawfully kill these men. No other
4 conclusion can be drawn from the facts that he pointed this
5 .22 high standard pistol at both of them and pulled the trigger,
6 in fact, killing them both.

7 You have the testimony, of course, that both
8 victims died as a result of gunshot wounds. All of this
9 evidence is corroborated by a number of other items of
10 physical evidence.

11 In the first place, we have Mr. Schreiber's pistol,
12 there isn't any doubt that this is the murder weapon.
13 Mr. Schreiber described to you how Thomas Creech was in his house
14 with Carol Spaulding. He described to you how the gun was
15 taken from there. He identified that as his gun when
16 Mr. Schreiber came back after being out for the day. The gun
17 was gone and, so, when Mr. Creech and Miss Spaulding --
18 Spaulding testified that she was not the one that took it. It
19 was obviously Mr. Creech who had it.

20 Carol Spaulding testified that Creech had the gun
21 all the way down the road until after they left Boise, except
22 for a brief period of time when they were in Boise and it was
23 before that that the killing occurred.

24 It's clear that the gun was in Creech's possession
25 at that time. It's clear that he had access to it right up

1 until the time that they were arrested. The gun was handed over
2 to Miss Spaulding just a short time before the arrest, put it in
3 her black handbag; which is over there on the evidence table and
4 that's where it was when this defendant was arrested at
5 Glenns Ferry.

6 The evidence is pretty clear that that was the
7 murder weapon. You've heard the FBI Laboratory experts testify
8 that cartridges, or shell casings found at the scene of the
9 crime in the car were fired from this gun and that the riflings
10 on the slugs which were removed by Dr. Scott during the autopsy
11 were consistent with having been fired from that gun; even though
12 it's impossible, in the condition that the bullets were in, to
13 have had any further ballistics than that. But, it's pretty
14 convincing as it is.

15 There's no question that was the murder weapon. In
16 addition to that Mr. Creech's clothing was full of blood, at
17 least the jacket he was wearing, both jackets found in possession
18 in the automobile, both of which were identified to be Mr. Creech's,
19 had a great deal of human blood on them, blood in many places.

20 Furthermore, both Creech and Carol Spaulding were
21 seen during the day of the murder at various points along the
22 road from Lewiston on down to Donnelly where the killing occurred.

23 Now, I want to point something out to you in
24 connection with the testimony of John Stewart. You will recall
25 that Mr. Creech was asked to stand up in the courtroom to

1 discredit Mr. Stewart's testimony.

2 Stewart described Creech as weighing something like
3 190 pounds and being taller than six feet. Keep in mind that
4 this pea coat which has been introduced into evidence and
5 identified by witnesses as belonging to the defendant is a
6 bulky item. It is conceivable that anybody wearing this would
7 appear to be more than 100 -- more than Mr. Creech appears to be
8 when he stands up in the courtroom.

9 So, I would simply suggest to you, when you consider
10 that, that Mr. Stewart's testimony is in any way discredited by
11 the fact that Mr. Creech standing here without that coat on
12 doesn't look like he weighs 190 pounds.

13 Furthermore, the statement that I mentioned to you
14 a moment ago, State's Exhibit No. 56, taken at Mountain Home
15 by Officer Woodall, shows that the defendant knew exactly how
16 many slugs had been fired into the victims' bodies. Pretty
17 clear information that he was there.

18 We have then the defendant's theory that it was
19 actually Dan and Kathy who committed this murder while
20 Mr. Creech was himself in another automobile and that the motive
21 for this was to get a pound of heroin out of the back of the
22 trunk -- or the car.

23 It seems quite incredible and I submit to you that
24 it is, that these two drunks driving down the road in a 1956
25 automobile would have anywhere from one pound to \$200,000 worth

1 of heroin in the back of their car. That part of the story is
2 simply unbelievable.

3 In addition to that I call your attention to the fact
4 that none of the officers who testified and were cross-examined
5 said anything about ever having heard this theory before the
6 trial began. Furthermore the State brought before you information,
7 testimony under oath, the persons who were accused of having
8 committed the crime, Dan and Kathy Spaulding.

9 We demonstrated to you with the testimony of
10 other witnesses that up until the time of this killing they
11 were too far away to have been involved in it. I suggest to you,
12 ladies and gentlemen, that this story is unbelievable and I
13 refer back to the questions that we asked some of you during
14 the voir dire about whether or not you could distinguish between
15 a fanciful and imaginary doubt and a reasonable doubt. I submit
16 to you that this is your opportunity.

17 This doubt which the defendant has attempted to
18 interject with this story is an imaginary doubt. It is not
19 credible in any way. The defendant has attempted in this case,
20 by putting on evidence of a number of other crimes, and most of
21 which you heard could not be verified, to confuse the issues in
22 this case; just as the defendant has attempted to confuse law
23 officers about what he has done and what he has not.

24 We submit to you that this is a deliberate attempt
25 on the part of the defendant to draw attention away from the

fact that he committed the murders for which he's on trial here. You are at liberty, ladies and gentlemen, to disbelieve this unbelievable story.

I want to comment just a moment about the psychiatric evidence which you heard. All of the psychiatrists who testified here, testified that there was no significant evidence that the defendant was suffering from any mental disease or defect of a serious character. That is not to say, of course, that it is normal, necessarily, to go around killing people. But, the defendant has no excuse based on mental disease or defect in this case because he is not suffering from a mental disease or defect which causes the crime to be substantially the product of that.

All of the testimony as to the effect of this defendant could premeditate, could tell the difference from right and wrong, could conform his conduct to the law if he had wanted to do so. As the Court has instructed you, mere repeated antisocial conduct or criminal conduct is not itself sufficient mental disease or defect as to excuse the commission of criminal acts.

The evidence in this case shows that the defendant, Thomas E. Creech, shot Arnold and Bradford; that he had time to premeditate. It shows that he did premeditate; that he had malice aforethought because he intended to kill these people.

Ladies and gentlemen, I submit to you that the

1 accused, Thomas Eugene Creech, is guilty of murder in the first
2 degree.

3 THE COURT: Does that close the State's closing argument?

4 MR. THOMAS: Yes, Your Honor.

5 THE COURT: Counsel may proceed.

6 MR. ROBINSON: Counsel, Judge Durtschi, ladies and
7 gentlemen of the jury:

8 Unfortunately your work is just beginning. The
9 staff of this court, the officers of the court, the witnesses
10 have completed their portion and your arduous task is just going
11 to begin because you did not, and haven't been susceptible to
12 all of the evidence in this case on a personal basis. You
13 haven't heard it all. It has been submitted to you on the
14 admissions of particular items of evidence that the Court has
15 weighed and determined were material and relevant for this jury
16 to consider in performing its tasks and its deliberations on
17 this most serious of offenses in our society, murder in the
18 first degree.

19 I'm sure that you are going to perform that duty
20 that you swore to do on taking the oath as jurors. I submit to
21 you that these items of evidence, being articles of clothing,
22 are the same kind of evidence that you need consider that are here
23 in written form and those that have been admitted by the Court;
24 which include the FBI reports, the FBI report that, specifically,
25 tell you whether or not blood on Thomas Creech's coat was

1 matched, categorized and typed and where on the coat that blood
2 did appear. That's something you must look closely at yourself
3 in order to make a determination to the value of those articles
4 and items of evidence.

5 No less than that the Court has admitted many other
6 items, transcripts, for specific and limited purposes. The
7 Court has admitted Defendant's Exhibits A and B, the rap sheets
8 of Arnold and Bradford, the autopsy reports, Officer Hill's
9 report and, specifically in that regard, Officer Hill's report
10 goes into the terminology, the vulgarity, the profanity used
11 by Carol Spaulding that we did not verbally bring to your
12 attention and force the witnesses to embarrass themselves and
13 embarrass you and embarrass us.

14 But that is in evidence for you to look at, to
15 see, acquaint yourself with so that you can get the totality
16 of the personalities involved in this most tragic circumstance.

17 In addition to that you have, in written form,
18 Dr. Hurst's report, Dr. LaMarr Heyrend's report and,
19 specifically, Dr. Treleaven's report. I submit to you that
20 all of the items that are covered in those written reports are
21 evidence in this case that you must examine and examine very
22 closely to make this determination.

23 The State in its opening portion of its statement
24 made reference to this early planning of defense and I'm sure
25 when you look at these written items of evidence that you will

1 see that long, long before the apprehension of Thomas Eugene Creech
2 this total pattern was in his lifetime, in his life, and you'll
3 see that more specifically from the total history made at the
4 Oregon State Hospital at Salem. Read that evidence, acquaint
5 yourself with it. It was placed in evidence for that purpose.

6 Now, let's go back and relate specifically to what
7 Tom Creech himself testified to you about his early youth, his
8 family, the circumstances that he grew up under and this
9 split home, the violence that was personally a part of his life
10 and the impact that this had on the development of that
11 personality from before age nine.

12 It has been calculated that the average age of
13 this jury is 42 and a half years and for the consideration of
14 this case that is most important because you, the jury, were
15 not asked to come here and leave your experiences of life
16 outside of the courtroom. You were to bring all of your
17 exposure, your experience and your intelligence here and use it
18 as members of this jury and, in using that I want to bring
19 something to your attention you might have let slip.

20 If you will think back in the middle 50's
21 Thomas Eugene Creech born September 9, 1950, this world was
22 being subjected to extinction; as a matter of fact the latter
23 part of the 50's, the threat of annihilation by tremendous
24 explosives had an impact around the world that people were even
25 building bomb shelters in their back yards and in their

1 basements.

2 This, on a daily basis, was coming across that
3 media known as a television tube and, certainly, all of this had
4 to have impact on the youth of America.

5 In addition to that impact Tom Creech's life was
6 suffering under the impact of that home life described. These
7 formative years being susceptible to this kind of a world and
8 a society.

9 Think too of the early 60's where we, described by
10 youth, the establishment, the riots, the disruption, the thoughts
11 that you and I have lived through and the impact upon individual
12 young people growing of age and attempting to maintain a
13 semblance of order in life discipline, allegiance. Tom
14 testified to you about his baptism, his double baptism and the
15 manner and the way in which it was done, the split of religion.
16 He explained to you this portion of his life and, then, the
17 impact of an occurrence that took place when he was 15 years
18 of age, and all of us here can remember what 15 years of age
19 and growing up through adolescence was like with us.

20 The impact of Sandy's death and Danny Johnson's,
21 the homosexual in San Francisco and during this period of time
22 becoming susceptible to a Satanic Cult; to people who pulled
23 Tom next to them, made him feel a part of and a follower.

24 He told you in his testimony that he made a pact
25 with Satan and from that point on I'm sure I don't have to stand

1 here and reiterate all of the circumstances that were testified
2 about; a death syndrome that followed over the next nine years.

3 During this period of time there was incarceration
4 in the Idaho -- in the Ohio State Penitentiary or the reformatory,
5 there were the impacts of his father's death, the then move to
6 the Lima State Hospital, the subsequent discharge and that
7 after a very erratic military career and that, interposed and
8 following a marriage to Emma, and the AWOL's that was testified
9 in great detail.

10 You put that all together with what you heard from
11 the psychologists and the psychiatrists and what they testified
12 to you, varying in their professional opinions, and you add it
13 up to try to make a determination of that testimony and life as
14 it relates and is consistent, or inconsistent, with the other
15 evidence you now have to make yourselves acquainted with and
16 bring that all to bear on what you are here to be the jury and
17 make a determination of the facts that occurred in the early
18 a.m. hours of November 4, 1974.

19 I submit to you, after your careful deliberation and
20 your thoughts that there will be great disagreement among you
21 all, but, that finally you will bring in a verdict and that
22 verdict, we feel, will be the justice that should come in this
23 case based upon these facts.

24 THE COURT: Mr. Remaklus.

25 MR. REMAKLUS: Your Honor, Mr. Robinson, ladies and

1 gentlemen of the jury:

2 We have been here a long time and I shall not keep
3 you much longer. This attempt to put society on trial leaves me
4 cold because, when you draw upon your experiences in life, how
5 many young people do you know that use the excuse of an
6 unhappy childhood to commit murder?

7 He is asking you people to excuse murder because he
8 had an unhappy childhood. There's no way that you can tie this
9 unhappy childhood into any kind of a mental condition that will
10 excuse this man for what he did.

11 You heard Dr. -- you heard Dr. Estess, you heard
12 Dr. Treleaven. They told you that he knew the difference between
13 right and wrong. He knew the consequences of his acts. They
14 didn't -- Dr. Heyrend never disputed that he didn't find mental
15 disease or defect, ladies and gentlemen. Of course, neither
16 did the psychologist.

17 I think his testimony was that everything was within
18 the normal range. Just think of that. Think of this proceeding
19 here we are in Wallace, Idaho in a courtroom. Contrast this,
20 if you will, with the early morning hours of November the 4th,
21 1974 when Tom Creech was self-appointed judge, jury and
22 executioner. Contrast that with this proceeding. A jury of 12
23 people of Shoshone County, this Court, able Defense Counsel,
24 the reasonable doubt burden that we must bear as representatives
25 of the State and which I am sure that we have met.

1 Ladies and gentlemen, there's a great mass of
2 physical evidence. When you go to the jury room, of course, if
3 you want to, you may open the bags that we have not opened.
4 You will have coats, you will have the coat -- here's the long
5 maxi coat that you will take in there to look at. This coat
6 was, really, the key to this case. What if Lester Kelly had not
7 been up around Lewiston, Idaho on November 3rd and just by
8 chance driving along the road, saw young people that he thought
9 were college kids when this old blue and white Buick pulled over
10 to the side of the road. What did he see? The most striking
11 thing was a young girl with long blonde hair and a long maxi
12 coat and a young man, of course, that was with her wearing what
13 we thought was a Navy pea coat.

14 Not a bad recollection, you know, for describing,
15 driving by seeing it. I guess we wouldn't be here, ladies and
16 gentlemen, if a young sharp-eyed police officer down in
17 Glenss Ferry hadn't seen the same blonde girl with long hair
18 wearing the same coat.

19 Anyway, at the opening of the trial my opening
20 statement I talked about a road map of sorts and, of course, the
21 map started at Lewiston, Idaho and we finally got down to
22 Donnelly, Idaho. We had some detours, we had some detours into
23 the trials of society, detours into some kind of a religion that
24 I don't understand and that had no impact, I might add.

25 Then the statements of the Oregon Hospital that

1 were put in evidence this morning. I want to have you look at
2 those very carefully; you are not going to find any Satanism in
3 there, of course, where Satanism comes from, I don't know, but
4 it came in, I think, since he was in the -- oh, that came into
5 the story since he was in the Oregon Hospital and they released
6 him as a responsible human being.

7 But, anyway, we get down the road. We go down the
8 road to this incredible story of these two men whose FBI sheets
9 show that they were drunks and one of them, I think, was a
10 child beater. But, these two men, one who had this old car,
11 a battery charger was stolen and sold for gas money and beer
12 money, somebody sold the coat for more money.

13 We're told that they had a couple hundred thousand
14 dollars worth of heroin which makes you wonder why they sold the
15 battery charger and selling the coat. But, we got to this
16 place on State Highway 55, we have the Exhibit here.

17 When they arrived there you heard the evidence,
18 Carol, one was in the front seat, she wanted to trade places
19 with the defendant because, apparently Tom Arnold was getting
20 somewhat fresh, he had his arm around her shoulder and feeling
21 her breasts or something of that nature.

22 So, that was the reason that she asked to stop the
23 car. Now, keep this in mind, ladies and gentlemen. She was
24 sitting in the middle, the defendant gets out of the car,
25 Carol got out of the car, was pushed aside, the defendant, with

1 Bill Schreiber's pistol, leaned back into the car, shot
2 Tom Arnold in the right temple -- in the right temple, okay, he's
3 behind the driver's wheel, he's got to be looking right straight
4 ahead down the road and he's shot in the temple. Bradford comes
5 out of the back seat and when he raises up he gets shot directly
6 in the face because he was facing Mr. Creech.

7 I wonder how dangerous Arnold and Bradford would
8 have been as adversaries with Arnold -- the blood alcohol of
9 .195 and Bradford with an alcohol of .14? Not very dangerous,
10 ladies and gentlemen.

11 Can you imagine the scene there that night then as
12 the evidence shows it was cold, it was windy, a young terrified
13 girl and man with a pistol in his hand just murdered two men.
14 Just imagine that.

15 That old stinking car that they've testified to.
16 It's a little bit beyond belief. That's what happened, ladies
17 and gentlemen, and that's what we have to deal with here today.

18 Anyway, the journey continues on down the road
19 through an armed robbery down there in Boise, down to where the
20 arrests were made because of Bill Hill's alertness there at
21 Glenns Ferry. He sees the blonde girl in the maxi coat. Of
22 course, that alerted him, the arrest was made and we finally get
23 to the -- after the defendants were taken -- or after this
24 defendant was taken to the Police Station in Glenns Ferry; that
25 a notification of rights, a notification of rights for the

1 protection of this defendant, I think he signed that "Tom Turner"
2 very carefully initialed it; all to show that he understood it.
3 This is a protection that this defendant received at Glenns Ferry
4 before any statements were taken.

5 Shortly after that they were transferred up to
6 Mountain Home and, again, the written notification of rights,
7 carefully initialed, the full protection of the Constitution
8 afforded to this man who didn't afford Arnold and Bradford a
9 second look up there on the highway and, then, a statement,
10 Exhibit 56. Now, this is a confession, ladies and gentlemen,
11 please don't be misled because the voluntary statement here
12 didn't say anything, you have to read what it says down here,
13 here's the thing. Mr. Woodall took this statement and, again,
14 he read the printed part with the constitutional warnings for
15 the protection of this defendant. What did he say? Said
16 "I did it". He said it three times and it's here for you to
17 look at. Now, that's not in his handwriting, ladies and
18 gentlemen. What is in his handwriting are the initials, the
19 corrections every place that's crossed out, every page is signed
20 by him and look down here at the bottom of Page 2, "I shot Tom
21 first". Now, it says in there "Wayne" and that's crossed out
22 and "Tom" is written over that and the initials "TEC". "I
23 shot him one time" and over here initialed again to show that
24 it was one time and the "S" is crossed out to show it's
25 exactly right.

Then, he says "Wayne had a knife. Wayne had a knife and come after me." I wonder, if Wayne had a knife and came at him, when he was standing outside the car, that old car that the door where he was sitting is the only one that would open. "I hit him with the end of the gun he fell back and I shot him three times", again, very carefully initialed, "three times" and it certainly is no curious coincidence that Dr. Scott removed slug from Tom Arnold, who the defendant said he shot first and he removed three slugs from Bradford who the defendant said that he shot second and he shot him three times.

This statement goes on, you can take it in and you can read it. I'm sure you are as appalled as I am at the contents of the statements, that the story the defendant told here on the stand. It's unbelievable and when you draw upon your knowledge as mature men and women you are going to find that not believable too.

It was a pretty grim trip, ladies and gentlemen, from Lewiston to Donnelly, Idaho that night. I think we've got the trip and all its gorey details into evidence and that you will find no doubt in your mind as to what happened on that trip.

A detour or two about a biker, a biker without a bike, ladies and gentlemen. Do you know what the evidence is in this case about this man being a biker? He was seen pushing a Honda down the road one time down at Albuquerque and that's

1 the extent of the evidence, a biker. A hit man, a contract
2 killer for money or for personal satisfaction.

3 The psychiatrists gave you the answers, he's
4 insecure and he wants to be a big shot and the only way he's
5 done it is through antisocial activity, breaking the law. This
6 gets attention, gets him attention here in the courtroom.

7 We're all here because of him. This is quite an
8 event. He comes up here after this story and asks you people
9 to excuse his acts and conduct. Incredible. Incredible.

10 Ladies and gentlemen, as you retire to read the
11 statements, look at these pictures, look at the clothing, you
12 play the tape recorder, the Judge is going to send the
13 instructions with you so you can read them. You'll have,
14 someplace in this great mass of evidence, you have the FBI
15 report that will give you all of these "Q" numbers that we
16 talk about so you can follow these things through the evidence
17 and satisfy yourselves that the evidence that the State has
18 presented here is.

19 In short, ladies and gentlemen, when we retire you
20 to consider the verdict in this case you go through that door
21 into the other room, when I sit down I know the administration
22 of justice is secure in Shoshone County. I know that you people
23 are going to review the evidence and return a verdict based only
24 on the evidence that's produced in this courtroom as each of you
25 stated you would do when we had jury selection which was a long

1 and arduous process and I know you all understand the reason
2 for it.

3 I don't envy you your deliberations, I don't envy
4 you the responsibility. But, everybody has responsibility in a
5 case like this, the Judge to preside, the State to present
6 their evidence and this jury to consider the evidence and return
7 here a verdict based on the evidence that you saw in this
8 courtroom and what you heard produced from that chair.

9 Thank you, ladies and gentlemen.

10 THE COURT: Upon retiring to the jury room you will select
11 one of your number as foreman.

12 This being a criminal case, your verdict must be
13 unanimous. When you arrive at a verdict, the foreman will sign
14 it and you will return it to open court.

15 In arriving at your verdict you should not resort
16 to any means or methods of chance.

17 Forms of verdict suitable to any conclusion you may
18 reach will be submitted to you with these instructions.

19 At this point we're going to -- we don't have
20 Mr. and Mrs. Armbruster aren't here, they will have to be sworn
21 separately at a later time. But, I'm going to have the Clerk
22 swear the Bailiffs at this time to take charge of the jury during
23 their deliberations and we'll -- Mr. and Mrs. Armbruster come
24 up and we'll have them sworn separately.

25 (Whereupon Mrs. Dumont and Mr. Falsetto were sworn

1 to take charge of the jury.)

2 THE COURT: Well, ladies and gentlemen of the regular
3 jury panel, now the case is fully submitted to you so you can
4 now retire to deliberate together on your verdict.

5 Now, Mrs. Honeycutt, you've sat here and listened to
6 the whole proceeding and you will still have to hold yourself
7 available to be a substitute juror in case anything happens
8 before the verdict is reached.

9 Our rules require that the substitute juror be
10 kept in the custody of the -- it says "Sheriff" but the Bailiffs
11 are Deputy Sheriffs, or in the custody of the Bailiffs during
12 the trial until the jury is finally discharged in case you have
13 to be used.

14 So, you will need to try to retain everything you've
15 heard during the proceeding in case you need to utilize it
16 sometime during the course of the deliberations and I will
17 instruct the Bailiffs that Mrs. Honeycutt will have to be
18 separate from -- she can't participate in the deliberations
19 unless she is substituted as a regular trial juror. But, you
20 will need to keep her available so -- and apply the oath as far
21 as your supervision of her also as far as not communicating with
22 anyone or having anyone communicate with her about the -- any
23 subject connected with the case.

24 So, the regular jury may not retire and deliberate
25 on your verdict.

(Whereupon the jury retired to the jury room.)

THE COURT: If you'd swear Mr. and Mrs. Armbruster, please.

(Wereupon Mr. and Mrs. Armbruster, two of the Bailiffs herein, were sworn to take charge of the jury.)

THE COURT: May the record show that in the trial record there are no Exhibits marked 31 through 40, inclusive; that those exhibits were marked at the beginning of the trial in Cascade, in Valley County and in the present trial have been incorporated in Exhibit 47 -- wait a minute, it's more than 47.

The shell casings in one of these --

MR. REMAKLUS: Yes, 32 through 40 are "Q" numbers in this trial.

THE COURT: 32 through 40 are included in Trial Exhibit 47?

MR. REMAKLUS: Yes, Your Honor.

THE COURT: And 31 is what? That's 46? Exhibit 31 is in one of those Exhibits, then?

MR. REMAKLUS: Yes, Your Honor, Exhibit 31 is either here included in Exhibits 46 or 48, as I understand it.

THE COURT: Yes. All right, I guess that's --

MR. REMAKLUS: We have some other Exhibits that were marked at Cascade and not used in this trial.

THE COURT: Can you put those in the record just for continuity?

1 MR. REMAKLUS: Yes, Your Honor.

2 THE COURT: Which were marked and not identified in this
3 trial, or marked in this trial?

4 MR. REMAKLUS: I have Exhibit 1 that was marked at
5 Cascade and not used in the trial and I have Exhibits 1-I, 1-N,
6 1-O, 1-P, 1-Q. I don't find an Exhibit 1-D.

7 Also marked at Cascade were State's Exhibits 15,
8 16 -- here's 14, 19 and 29-E.

9 All right, I find some more numbers here, photographs,
10 2-A, 2-B and 2-C. These constitute all of the Exhibits that I
11 can locate that were marked at Cascade and not introduced at
12 this trial, Your Honor.

13 THE COURT: I would like to do one other thing. I
14 don't know when the most convenient time to do it would be. I
15 would like to make a record with our Bailiffs as to one or two
16 of the things that have happened during the course of the
17 trial as far as illness and trips to dentists and doctors to
18 get shots and things like that.

19 MR. ROBINSON: Can we do it right now, Your Honor?

20 MR. REMAKLUS: It's agreeable, yes, Your Honor.

21 I don't think the presence of the defendant is
22 necessary for this exercise.

23 THE COURT: Mrs. Dumont, if you need your log book why
24 don't you get it.

25 MR. REMAKLUS: We are off the record now for a minute,

1 all right?

2 THE COURT: Yes.

3 (Off the record discussion between Court and
4 Counsel had.)

5 THE COURT: We will take Mrs. Dumont first and we will
6 just ask you -- if you have additional information she doesn't
7 have, you can give it to us, Mr. Falsetto.

8 Why don't you swear her.

9
10 JOICE DUMONT,
11 a Bailiff in the above-entitled case, being first duly sworn,
12 testified as follows:

13
14 THE COURT: Why don't you sit up here, Mrs. Dumont, and
15 we can hear you better.

16 I was thinking maybe, before we start this, we
17 ought to let them get the Exhibits and instructions and verdicts
18 in there. Mr. Falsetto, do you want to start doing that and
19 take these in first. These are the instructions and the verdicts
20 and, then, probably start taking those Exhibits in.

21 Why don't we just relax until he gets those Exhibits
22 in and then we can start.

23 (Brief delay.)

24

25

EXAMINATION

BY THE COURT:

Q Would you just state your name for the record.

A. Joice Dumont.

Q And, Mrs. Dumont, you've been one of the Bailiffs that has acted during this trial since it started, is that right?

A. Yes, that's right.

Q Can you tell me, were you originally sworn in as a Deputy Sheriff to act as Bailiff?

A. Yes, that's right.

Q And that was before this trial ever started?

A. Yes. I believe it was on a Thursday or so, of the previous week.

Q And you, as I understand -- actually, all four of you, you and Mr. Falsetto and Mr. and Mrs. Armbruster had instructions from Judge Towles as to your duties as a Bailiff when you were first sworn in, is that right?

A. Yes. Your Honor, I never met with Judge Towles because I was one that was called later.

Q Later?

A. Yes. He was gone when they called me and I didn't meet with him.

Q You did have a meeting with me before the trial started?

1 A. Yes, that's right.

2 Q And all four of you met with me before the trial
3 started, is that right?

4 A. Yes.

5 Q And I instructed you as to your duties, not to let
6 anyone talk with the jury, you couldn't talk with them, is that
7 right?

8 A. Right.

9 Q That you wouldn't be able to let the jury separate
10 except to go to their individual rooms at the motel during the
11 trial?

12 A. Yes, that's right.

13 Q As I understand, you and Mr. Falsetto have been the
14 daytime Bailiffs and Mr. and Mrs. Armbruster have been the
15 nighttime Bailiffs; is that the way you divided the work?

16 A. Yes, that's right.

17 Q Have you, along with Mr. Falsetto, had custody of
18 this jury during every recess during the daytime since this trial
19 first started?

20 A. Yes, sir.

21 Q Have you had any occasion since this trial first
22 started when any of the jurors have been permitted to separate
23 during any recess, except to go to their individual rooms at
24 the motel?

25 A. No.

1 Q You haven't, personally, had any instance where you
2 have had to take any individual juror to the doctor or anything
3 like that?

4 A No. I was present when one woman had her allergy
5 shots. I was with her all the time, went in with her and --

6 Q Okay. Who was that?

7 A That was Bonnie Jameson.

8 Q Bonnie Jameson?

9 Now, how many allergy shots has she had while the
10 trial has been in progress?

11 A Two.

12 Q Did you personally accompany her?

13 A Yes, I did.

14 Q And where were those given?

15 A At the doctor's clinic in Kellogg.

16 Q You escorted her to the doctor's clinic?

17 A Yes, I did.

18 Q Were you personally present at all times while she
19 was getting her shot?

20 A Yes.

21 Q Was any subject connected with the trial ever
22 discussed with her by the doctor or with her?

23 A No. It was a nurse that gave her the shot and we
24 went right in and she was waiting for her in the, I suppose,
25 nurses' station in the hallway. She gave her the shot and we

1 went out the back door and there was nothing said in any way.

2 Q That happened on two occasions?

3 A Yes, one on a Monday and the other on a Saturday.

4 Q As I understand, Mrs. Dumont, you have, all four of
5 you, have kept a running log of the entire custody you've had
6 of the jury during the trial; is that correct?

7 A Yes, times we've left and any incidents or anything,
8 phone calls and such.

9 Q Are you personally acquainted with the arrangements
10 at the motel as far as what were in the rooms, TV, telephone and
11 things like that?

12 A The only TV was in the, what they considered the
13 Community Room of Unit 45 and that was always monitored. There
14 was someone there.

15 Q Who occupied that room?

16 A Mr. and Mrs. Armbruster.

17 Q That was the Bailiffs' room?

18 A Yes, um-hmm.

19 Q And that was the only room that had a TV?

20 A Yes, to my knowledge.

21 Q In other words, the TVs were taken out of all the
22 juror's individual rooms?

23 A I'm not sure about being taken out, but I think I
24 heard them mention that they were disconnected.

25 Q I think, maybe, the Armbrusters, know more about that,

1 don't they?

2 A Yes, they were there.

3 THE COURT: We'll, perhaps, talk to one or both of them
4 about that later on.

5 Q BY THE COURT: How about telephones? Do you
6 personally know what happened to the telephones in the juror's
7 individual rooms?

8 A The panel in the motel was -- they said "blocked off"
9 and I seen that.

10 Q So, they couldn't personally make any telephone calls
11 from their rooms?

12 A No, and, if a phone call was made out by the
13 Bailiff you had to say who it was and, then, they went ahead and
14 took the number.

15 Q So, all telephone calls went through the Bailiffs?

16 A Yes, they did.

17 Q Incoming and outgoing?

18 A Right.

19 Q There was no direct telephone communication --

20 A Absolutely none.

21 Q -- with any other person?

22 And, as I understand you, at least during the daytime
23 recesses you and Mr. Falsetto were in charge of the jury and
24 they were in your custody from the first recess we took after
25 the jury was sworn until this very moment?

1 A. Yes, sir.

2 Q Okay. And, except for the times you've related,
3 you know of no time when the jury has ever been permitted --
4 any of the jurors have ever been permitted to separate?

5 A. Not to my knowledge, no.

6 MR. FALSETTO: We had Oberg.

7 THE COURT: I will let you testify.

8 Counsel want to ask any questions?

9 MR. REMAKLUS: No, thank you, Your Honor.

10 MR. ROBINSON: No questions, Your Honor.

11 THE COURT: Thank you, Mrs. Dumont, you may step down.

12 Mr. Falsetto, if you want to be sworn, please.

13

14 ALBERT FALSETTO,

15 a Bailiff in the above-entitled matter, being first duly sworn,
16 took the stand and testified as follows:

17

18 EXAMINATION

19 BY THE COURT:

20 Q Mr. Falsetto, you were one of the Bailiffs in the
21 daytime -- oh, let me get the record going right here, first,
22 will you state your name for the record, please.

23 A. Albert Falsetto.

24 Q As I understand, you were one of the daytime
25 Bailiffs among the four Bailiffs that we had?

1 A. Yes.

2 Q And you were with Mrs. Dumont as a daytime Bailiff?

3 A. Yes.

4 Q Were you present when Mrs. Dumont just testified?

5 A. Yes.

6 Q Did you just hear her testimony?

7 A. Yes.

8 Q Is there anything you can add to her testimony as

9 far as any knowledge you personally have of any of the jurors

10 being permitted to separate, from the very commencement of the

11 trial until this time?

12 A. Only thing is when we -- the one went to get her

13 shot, I made the circle over to the hospital and all the jurors

14 were in the bus and she stayed with them and I took Oberg in,

15 his wife was in the hospital and I went with him to see her and

16 we was only in there a couple minutes and we went back out.

17 We went to supper.

18 Q How many times did that occur?

19 A. Twice.

20 Q Mr. Oberg is one of the jurors, right?

21 A. Yes.

22 Q And did you understand that his wife went into the

23 hospital after this trial commenced?

24 A. Yes.

25 Q And you allowed him to go visit her twice?

1 A. Twice. I went with him both times.
2 Q And you went with him both times? Were you
3 constantly present during the time he was visiting his wife?
4 A. Yes.
5 Q Was any subject ever discussed about the case?
6 A. Not a word.
7 Q Okay. And that's the only time you know of since
8 this trial commenced that any jurors were permitted to separate?
9 A. That's right.
10 Q Other than the times when they went to the
11 individual motel rooms?
12 A. That's correct.
13 THE COURT: Counsel want to ask questions?
14 MR. REMAKLUS: No, thank you, Your Honor.
15 MR. ROBINSON: No questions, Your Honor.
16 THE COURT: All right. Thank you, Mr. Falsetto.
17 I want to personally express appreciation to both
18 of you. I feel you've done an excellent job and we have
19 appreciated it.
20 MR. REMAKLUS: We would join in that, Your Honor.
21 THE COURT: All right, I'd like to do the same thing
22 with Mr. and Mrs. Armbruster when we get them up here at the
23 time when all attorneys are present. They are down at the motel
24 now with Mrs. Honeycutt, so, okay.
25 (Recess taken.)

1 WALLACE, IDAHO, WEDNESDAY, OCTOBER 22, 1975, 10:15 A.M.

2
3
4 THE COURT: First order of business, I wanted to complete
5 the record that we started last night with two of the Bailiffs
6 that had custody of the jury during the trial. Mr. Armbruster,
7 would you come up, please.

8 If you'd be sworn, please, Mr. Armbruster.

9
10 RALPH ARMBRUSTER,
11 a Bailiff in the above-entitled matter, being first duly sworn,
12 took the stand and testified as follows:

13
14 EXAMINATION

15 BY THE COURT:

16 Q State your name for the record, please.

17 A Ralph Armbruster.

18 Q Mr. Armbruster, you have been one of the Bailiffs
19 during this trial; haven't you?

20 A I have, yes.

21 Q As I understand, you were originally sworn as a
22 Deputy Sheriff before this trial ever commenced, is that right?

23 A Right.

24 Q And you and Mrs. Armbruster were both appointed
25 Deputy Sheriffs and Bailiffs for the trial?

1 A. That's right, sir.

2 Q. Is it my understanding that you did have
3 instructions from Judge Towles when you were first appointed as
4 to your duties as a Bailiff?

5 A. We did, yes.

6 Q. Speak loudly so Counsel can hear you.

7 A. Yes, we did.

8 Q. Is it also true that you had a conference with all
9 four Bailiffs, you and Mrs. Armbruster, Mrs. Dumont and
10 Mr. Falsetto, before the trial commenced explaining your duties
11 to you?

12 A. That's right.

13 Q. You've served as a Bailiff during the entire process
14 of selecting the jury and from the commencement of trial, is
15 that right?

16 A. I did, yes.

17 Q. And, as I understand the division of responsibility
18 between you and Mrs. Armbruster and Mrs. Dumont and Mr. Falsetto,
19 you were the night Bailiffs on duty at night?

20 A. That's true, yes.

21 Q. You were on duty when the jurors were in the motel,
22 then?

23 A. That's right.

24 Q. Would you describe for myself and Counsel what the
25 room arrangements were in the motel as far as location in

1 reference to the room you were in?

2 A Yes. The rooms were on the -- on the west side and
3 court in between and rooms run from 35 to 41, inclusive, and
4 11 to -- I can't remember the numbers of those rooms, anyway.
5 But, they were all facing -- we were facing the rooms from our
6 room where we stayed and we had a window that we could observe
7 all these rooms and this room was on the far corner and they
8 called it the "Executive Room", I think. Usually it was around
9 5:00 when we'd get there and that was about the time the jury
10 would come and we'd take them to dinner around 6:30. We'd
11 leave the day Bailiffs at that time.

12 Of course, then the jurors, they'd come over to our
13 place and we'd have coffee or whatever they wanted and they'd
14 set around in there; those that wished to, and rest stayed in
15 their rooms.

16 Q You were located, then, so you could observe the
17 doors to all the rooms of the jurors?

18 A At all times we could see those all the times, yes.

19 Q Did one or the other, you and Mrs. Armbruster, stay
20 awake all night to watch?

21 A We'd usually when the other would retire, I would
22 lie down for about an hour and a half and she'd wake me and,
23 then, I'd take over until morning.

24 Q I see. Can you describe to us what was done in the
25 individual rooms of the jurors as far as TV and telephones?

1 A. Well, before the jurors came down after they were
2 selected, my wife and I went down there and, with the manager,
3 we had all the TVs disconnected and we talked to him about
4 telephones. We plugged all those that was going to those rooms.
5 They couldn't call out no way.

6 When they viewed television in our room, we monitored
7 it all the time.

8 Q. So, the only place that you could view television --

9 A. Was in our room.

10 Q. -- was in your room and you monitored it at all times?

11 A. That's right; one or the other of us always monitored
12 it.

13 Q. How were the telephone calls that they wanted to make
14 handled?

15 A. The telephone calls came from the office to our
16 room and, if somebody had something to say, Sophie talked to
17 them, then she transmitted -- or transferred the message to
18 the juror. If they had a message to send back, why, that's the
19 way it was handled again.

20 Q. Every message was transmitted through you and your
21 wife?

22 A. Yes.

23 Q. Did you maintain any control over the newspapers
24 that were made available to the jurors?

25 A. Yes. There was one local paper that was -- I think

1 there was one for every room, but they were all delivered to our
2 room and, before anybody saw them they were censored and
3 anything that was in there relating to the trial was clipped out
4 and every morning, one or the other of us would get a
5 Spokesman Review and we censored that before anybody saw it.

6 Usually the paper was always left in our room because
7 there was only one paper and anybody that wanted to see it, they'd
8 read it there.

9 Q Okay. I understand from the testimony of
10 Mrs. Dumont and Mr. Falsetto yesterday that you kept a daily
11 log of the activities of the jury, is that right?

12 A Well, that's true. My wife done that. She's a
13 better bookkeeper.

14 Q You might just ask her about that?

15 Let me just ask you if you are personally aware of
16 any time during your custody of the jury which was, as I
17 understand, from the beginning of the trial that all night
18 recesses, that anyone was permitted to communicate with any of
19 these jurors about any subject connected with the case?

20 A Never. In our -- those jurors were never out of our
21 vision at any time that they talked to anybody, anytime, any --
22 and that was only from relatives that might come to see them and
23 one or the other was with them at all times. They were
24 instructed ahead of time that they didn't dare talk about anything
25 concerning the trial.

1 Q And, then, you were personally present, you or the
2 other to make sure that they followed that instruction?
3 A They were --
4 Q While they were in your custody was there any time
5 when they were -- any of them were permitted to separate; other
6 than to go to their individual rooms which were under your
7 observation?
8 A No, no time. Anytime any of the jurors was with
9 somebody, why, one of us was always right there.
10 THE COURT: Counsel have any questions?
11 MR. THOMAS: I just have one, and maybe I missed the
12 answer to it.

13
14 EXAMINATION

15 BY MR. THOMAS:

16 Q Mr. Armbruster, you said you monitored all of the
17 television and incoming messages, was --
18 A Right.
19 Q -- was the jury ever exposed to anything about the
20 trial on the television?
21 A No, they were not, because, if there was any news
22 on, especially when -- one stood right there at the switch.
23 MR. REMALUS: I had one question if I may.

EXAMINATION

BY MR. REMAKLUS:

Q. Mr. Armbruster, you are satisfied in your own mind that the jury was not exposed to any outside influences?

A. I am, yes, I am.

MR. REMAKLUS: Thank you.

MR. ROBINSON: Defense Counsel has no examination, Your Honor.

THE COURT: You may step down. We want to express appreciation to you for your fine service, Mr. Armbruster, as a Bailiff in this case.

THE WITNESS: Thank you.

MR. REMAKLUS: I would like to join in that.

MR. ROBINSON: And so does the defense, yes, Your Honor.

THE COURT: This is Mrs. Armbruster.

SOPHIE ARMBRUSTER,
a Bailiff in the above-entitled matter, being first duly sworn,
took the stand and testified as follows:

EXAMINATION

BY THE COURT:

Q. Would you state your name for the record, please.

A. Sophie Armbruster.

Q. Speak up a little louder, Mrs. Armbruster, so the attorneys can hear you.

As I understand, you've been one of the regular Bailiffs that's been particularly assigned to the night recesses from the inception of this trial; is that correct?

A. That's correct.

Q. Were you able to hear the questions we asked your husband, Mrs. Armbruster, and his answers?

A. Yes, I was.

Q. Is there any area where you would disagree with what he said, or that you would like to elaborate on?

A. No, the room numbers were 35 to 41, inclusive, and 11 to 16, inclusive.

Q. Was there any instance that you are aware of where you personally participated where any of the jurors were allowed to separate from the other jurors other than going to their individual rooms under observation?

A. We had one juror, member, Walter Nelson, that has an ulcerated tooth, or very swollen jaw that one morning and I had to take him to the dentist. I called Dr. Brandt and told him it was one of our jury members and would he see us in the

1 office and I went to the office with him, stayed with
2 Mr. -- or Dr. Brandt and Mr. Nelson at all times and he was also
3 cautioned that he was not to talk to Mr. Nelson about anything
4 regarding the trial.

5 Q And you were personally present at all times during
6 that examination?

7 A Yes.

8 Q Was anything about any subject connected with the
9 trial discussed by either the juror or the doctor?

10 A Nothing.

11 Q I understand you had one instance also where a
12 doctor was called to come to the motel, is that right?

13 A Yes.

14 Q Were you personally present when that happened?

15 A Yes.

16 Q Can you tell us what happened in that connection?

17 A This one evening, about 10:15 -- well, around
18 10:00 everyone had gone to their rooms and Mrs. Canterbury had
19 been in her room for quite a little while. About 10:15 she
20 knocked at our door and we saw her coming across the room area
21 there, and she said she felt very sick and her heart was beating
22 quite fast and I felt her pulse and it was. So, we put her on
23 our davenport there and I called the doctor; which was
24 Dr. Peterson, and he came up to the unit, No. 45, which was the
25 community room for all of them.

1 Q That was your room?

2 A Yes.

3 Q All right.

4 A And I told him the same thing; that she was a juror,
5 jury member, and he wasn't to discuss anything with her and he
6 checked her and found that she did -- had a little bit of high
7 blood pressure and he gave her a shot and I took her back to her
8 room and he told me I should check her a time or two through
9 the evening; which I did. Then, in the morning I had two
10 prescriptions filled for her.

11 Q Now, at that time when the doctor was there
12 examining her and in her presence, were either you or
13 Mr. Armbruster present?

14 A Yes. Ralph left the unit and went over to one of
15 the other juror's rooms, Room No. 16, just while the doctor
16 removed Mrs. Canterbury's blouse and checked her.

17 Q And you were personally present at all times?

18 A Yes, I was.

19 Q Was anything discussed about any subject connected
20 with the case?

21 A Nothing.

22 Q Are you aware of any instance where the jury was
23 -- any communication was made to any jury member about any
24 subject connected with the trial?

25 A I'm sure not.

1 THE COURT: Counsel want to examine?

2 MR. REMAKLUS: No, thank you.

3 MR. ROBINSON: Defense has nothing, Your Honor.

4 THE COURT: I want to express my personal appreciation,
5 I know I speak for Counsel, for your fine service as a Bailiff
6 in this case. You may step down.

7 THE WITNESS: Thank you.

8 MR. REMAKLUS: May I be heard for just one moment,
9 Your Honor?

10 On behalf of Mr. Thomas and myself we'd like the
11 record to show our appreciation to the fine people of Shoshone
12 County for the hospitality that has been extended to us and
13 the fine service rendered by all law enforcement personnel and
14 the citizens of this community.

15 THE COURT: Mr. Robinson?

16 MR. ROBINSON: Yes, Your Honor, we want the record to
17 reflect that the Defense joins in that. Thank you.

18 THE COURT: The Court does to. I feel we've certainly
19 had fine service from all the public officials in this County.

20 Counsel, I think the jury has advised the Bailiffs
21 they do have a verdict. Are Counsel ready to proceed with
22 that matter now?

23 MR. ROBINSON: Yes, Your Honor.

24 MR. REMAKLUS: Yes, Your Honor.

25 THE COURT: I want to make one observation just to the

1 spectators. This is always a rather tense time in a trial
2 where the jury does return its verdict and I think there is
3 some tendency for spectators, occasionally, to show some
4 emotion when a verdict is presented. I want to warn you that
5 I will not tolerate any audible comments or disturbance from
6 the spectators. If there is any at all I'm going to clear the
7 courtroom immediately.

8 You can bring the jury in.

9 (Jury entered the courtroom.)

10 THE COURT: Counsel waive the roll call?

11 MR. REMAKLUS: Yes, Your Honor.

12 MR. ROBINSON: Defense does, Your Honor.

13 THE COURT: Let the record show that all of the regular
14 jury panel are present at this time.

15 Mr. Powell, I thought I saw you carrying some
16 papers. Are you the foreman?

17 MR. POWELL: Yes, sir, I am.

18 THE COURT: Has the jury arrived at a verdict on both
19 counts?

20 MR. POWELL: Yes, sir, we have.

21 THE COURT: All right, if you would hand the verdicts
22 to the Bailiff, please.

23 We're required by law, under the Statute of the
24 State of Idaho, to determine that -- at this point, whether
25 all of the jurors agree with the verdict that's been signed by

1 the foreman under the instructions of the Court.

2 The way we handle this, ordinarily, we would just
3 have the Clerk read the verdicts to the jury and, then, ask
4 the jurors if they agreed with the verdict and they could answer
5 in unison.

6 Because of the nature of this case, I'm going to
7 require the Clerk to poll you individually on each verdict.
8 What the Clerk will do will read the verdict in Count I, and then,
9 she'll call your individual names, go through you one at a time
10 and, if you agree with the verdict say "Yes". If there's any
11 of you that had any question about the verdict, didn't understand
12 which one the foreman was going to sign or that he was going to
13 sign this one and -- in other words, if you don't agree with the
14 verdict say "No" when your name is called.

15 Then, we'll repeat the same process with
16 Count II.

17 If you would read the verdict as to Count I,
18 Madam Clerk, and then, poll the jury.

19 (Whereupon the verdict as to Count I was read
20 by the Clerk and jury polled individually as to Count I.)

21 THE COURT: It appearing that the verdict was unanimous,
22 I'll direct the Clerk to record the verdict.

23 Read Count II, Madam Clerk.

24 (Whereupon the verdict as to Count II was read by
25 the Clerk and jury polled individually.)

1 THE COURT: It appears to the Court that the verdict is
2 unanimous. I'll direct the Clerk to record the verdict as to
3 Count II.

4 This completes your service in the case, ladies and
5 gentlemen. I wish to express appreciation to you for your
6 service in the case. It's been, I know, not a pleasant service
7 for you. It's been unpleasant, it's been trying under the
8 circumstances of being sequestered. But, we do appreciate your
9 service in this case.

10 Our whole jury system depends upon the citizens
11 performing this duty that you've performed and upon their
12 integrity and I know of no service a citizen can perform that's
13 a higher duty of citizenship than to serve on a jury and I do
14 express appreciation to you, each one, for your service and also
15 to the alternate juror for her service in this case.

16 You may be discharged at this time.

17 Before proceeding, I'm going to let the jurors leave.

18 (Jury left the courtroom.)

19 THE COURT: Defendant is entitled, under statute, to
20 take time before judgment is pronounced. Do you wish to take
21 time before judgment is pronounced?

22 MR. ROBINSON: Yes, we do, and, in that regard, I would
23 at this time request the Court that any further proceedings
24 be had in Boise, Idaho and appeal to the Court to cause an
25 immediate transfer of Thomas Eugene Creech to the Ada County

1 Courthouse at Boise and we will stand ready, soon as possible,
2 down there, Your Honor, to cover the balance of the matter.

3 MR. REMAKLUS: That's agreeable, Your Honor.

4 THE COURT: Is this agreeable to you, Mr. Creech?

5 MR. CREECH: Yes, Your Honor.

6 THE COURT: You understand you would have the right to
7 have all further proceedings in this County; being the County
8 to which venue was changed; including the pronouncement of
9 judgment and you are willing to waive the right; is that
10 correct?

11 MR. CREECH: Yes, sir.

12 THE COURT: All right, I'll enter an order to that
13 effect if you'll prepare it, Mr. Robinson.

14 MR. ROBINSON: Yes, Your Honor.

15 THE COURT: I'll continue the matter for further
16 proceedings to -- let me ask you; do you have any specific
17 request for a particular time?

18 MR. ROBINSON: Your Honor, I do. I must remain here on
19 the Sunshine case throughout this week and I do have a
20 commitment in the Sunshine matter to go underground next
21 Wednesday, on the 27th and hear motions before Judge Towles on
22 the 30th.

23 I would request the Court to set this matter up a
24 week from next Monday.

25 THE COURT: You want November the 3rd, then, is that the

1 date?

2 MR. ROBINSON: Yes, Your Honor.

3 THE COURT: All right. I'll set further proceedings in
4 the matter to be had on November 3rd in Ada County, Idaho, at
5 3:30 p.m.

6 We'll be in recess at this time. The defendant will
7 be remanded into the custody of the Sheriff.

8 I think we have a problem on these exhibits. Do
9 you have a proposal, Mr. Remaklus?

10 MR. REMAKLUS: Yes, Your Honor, I would request that
11 Derold Lynskey, Sheriff of Valley County, Idaho, be appointed
12 custodian of all evidence in this case, with specific direction
13 to return the same in his custody to be held by him at the
14 Valley County Courthouse until final disposition of this case.

15 MR. ROBINSON: I have no objection.

16 THE COURT: All right, I'll enter such an order if you'll
17 prepare it.

18 MR. REMAKLUS: Thank you.

19 THE COURT: I want to express appreciation of Counsel
20 for their courtesy in the case. I felt you both treated the
21 Court very well and appreciate it.

22 MR. ROBINSON: From the Defense, I felt that the Court
23 in this instance aided and assisted Counsel and I certainly
24 appreciate it personally.

25 MR. REMAKLUS: I'd like to, Your Honor, express our

1 appreciation.

2 (Whereupon the trial was concluded.)

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1 J U R Y I N S T R U C T I O N S

2

3 INSTRUCTION NO. 1:

4

5 Ladies and Gentlemen of the Jury:

6 It becomes my duty as judge to instruct you

7 concerning the law applicable to this case, and it is your

8 duty as jurors to follow the law as I shall state it to you.

9 The function of the jury is to determine the issues

10 of fact that are presented by the allegations in the

11 information filed in this court and the defendant's plea of

12 "not guilty." This duty you should perform uninfluenced by

13 pity for a defendant or by passion or prejudice against him.

14 You must not suffer yourselves to be biased against a defendant

15 because of the fact that he has been arrested for this offense,

16 or because he has been brought before the Court to stand trial.

17 None of these facts is evidence of his guilt, and you are not

18 permitted to infer or to speculate from any or all of them

19 that he is more likely to be guilty than innocent.

20 Therefore, in determining the guilt or innocence

21 of the defendant you are to be governed solely by the evidence

22 introduced in this trial and the law as stated to you by the

23 Court. For such purpose the law forbids you to be governed

24 by mere sentiment, conjecture, sympathy, passion, prejudice,

25 public opinion or public feeling. Both the State and the

1 defendant have a right to demand, and they do demand and expect,
2 that you will conscientiously and dispassionately consider and
3 weigh the evidence and apply the law of the case, and that you
4 will reach a just verdict regardless of what the consequences
5 of such verdict may be. Such verdict must express the
6 individual opinion of each juror.

7
8 INSTRUCTION NO. 2:

9
10 The masculine form as used in these instructions applies
11 equally to a female person.

12
13 INSTRUCTION NO. 3:

14
15 If in these instructions any rule, direction or idea be
16 stated in varying ways, no emphasis thereon is intended by me
17 and none must be inferred by you. For that reason, you are
18 not to single out any certain sentence, or any individual
19 point or instruction, and ignore the others, but you are to
20 consider all the instructions as a whole, and are to regard
21 each in the light of all the others.

22 The order in which the instructions are given has
23 no significance as to their relative importance.

24

25

1 INSTRUCTION NO. 4:

2
3 I have not intended by anything I have said or
4 done or by any questions that I may have asked to intimate or
5 suggest what you should find to be the facts, or that I believe
6 or disbelieve any witness who may have testified, and if
7 anything that I have done or said has seemed to so indicate,
8 you will disregard that intimation and form your own opinion
9 without regard thereto.

10
11 INSTRUCTION NO. 5:

12
13 You are the exclusive judge of the facts and of the
14 effect and value of the evidence, but you must determine the
15 facts from the evidence received here in court.

16 You must not consider as evidence any statement of
17 counsel made during the trial; however, if counsel for the
18 parties have stipulated to any fact, you will regard that
19 fact as being conclusively proved.

20 As to any question to which an objection was
21 sustained, you must not speculate as to what the answer might
22 have been or as to the reason for the objection.

23 You must not consider for any purpose any offer of
24 evidence that was rejected, nor any evidence that was stricken
25 out by the Court; such matter is to be treated as though you

1 had never heard it.

2 You must never speculate to be true any insinuation
3 suggested by a question asked a witness. A question is not
4 evidence and may be considered only as it supplies meaning to
5 the answer.

6

7 INSTRUCTION NO. 6:

8

9 The testimony of a witness, a writing, a material
10 object, or anything presented to the senses offered to prove
11 the existence or non-existence of a fact is either direct or
12 circumstantial evidence.

13 Direct evidence means evidence that directly proves
14 a fact, without an inference, and which in itself, if true,
15 conclusively establishes that fact.

16 Circumstantial evidence means evidence that proves
17 a fact from which an inference of the existence of another
18 fact may be drawn.

19 An inference is a deduction of fact that may
20 logically and reasonably be drawn from another fact or group
21 of facts established by the evidence.

22 It is not necessary that facts be proved by direct
23 evidence. They may be proved also by circumstantial evidence.
24 There is no distinction between direct evidence and
25 circumstantial evidence as a means of proof. Neither is

1 entitled to any greater weight than the other.

2
3 INSTRUCTION NO. 7:

4
5 Certain evidence was admitted for a limited
6 purpose.

7 At the time this evidence was admitted you were
8 admonished that it could not be considered by you for any
9 purpose other than the limited purpose for which it was
10 admitted.

11 You are again instructed that you must not consider
12 such evidence for any purpose except the limited purpose for
13 which it was admitted.

14
15 INSTRUCTION NO. 8:

16
17 Every person who testifies under oath is a witness.
18 You are the sole and exclusive judges of the credibility of
19 the witnesses who have testified in this case.

20 In determining the credibility of a witness you may
21 consider any matter that has a tendency in reason to prove or
22 disprove the truthfulness of his testimony, including but not
23 limited to the following:

24 1. His demeanor while testifying and the manner in
25 which he testifies;

- 1 2. The character of his testimony?
- 2 3. The extent of his capacity to perceive, to
- 3 recollect, or to communicate any matter about which he
- 4 testifies;
- 5 4. The extent of his opportunity to perceive any
- 6 matter about which he testifies;
- 7 5. The existence or non-existence of a bias,
- 8 interest, or other motive;
- 9 6. The existence or non-existence of any fact
- 10 testified to by him.

11

12 INSTRUCTION NO. 9:

13

14 A person is qualified to testify as an expert if he

15 has special knowledge, skill, experience, training, or

16 education sufficient to qualify him as an expert on the subject

17 to which his testimony relates.

18 Duly qualified experts may give their opinions on

19 questions in controversy at a trial. To assist you in deciding

20 such questions, you may consider the opinion with the reasons

21 given for it, if any, by the expert who gives the opinion.

22 You may also consider the qualifications and credibility of

23 the expert.

24 You are not bound to accept an expert opinion as

25 conclusive, but should give to it the weight to which you find

1 it to be entitled. You may disregard any such opinion if you
2 find it to be unreasonable.

3
4 INSTRUCTION NO. 10:

5
6 When a witness refuses to testify as to any matter,
7 basing his refusal on the constitutional privilege against
8 self-incrimination, you are not to draw from that fact any
9 inference as to the credibility of the witness or as to the
10 guilt or innocence of the defendant.

11
12 INSTRUCTION NO. 11:

13
14 Evidence that on some former occasion, a witness
15 who is not a party to this action made a statement or
16 statements that were inconsistent with his testimony in this
17 trial, may be considered by you only for the limited purpose
18 of testing the credibility of the witness. Testimony of such
19 inconsistent statements must not be considered by you as
20 evidence of the truth of the facts as stated by the witness on
21 such former occasion.

1 INSTRUCTION NO. 12:

2
3 A witness willfully false in one material part of
4 his testimony is to be distrusted in others. You may reject
5 the whole testimony of a witness who willfully has testified
6 falsely as to a material point, unless, from all the evidence,
7 you shall believe the probability of truth favors his
8 testimony in other particulars.

9 However, discrepancies in a witness' testimony or
10 between his testimony and that of others, if there were any,
11 do not necessarily mean that the witness should be discredited.
12 Failure of recollection is a common experience; and innocent
13 misrecollection is not uncommon. It is a fact, also, that two
14 persons witnessing an incident or a transaction often will
15 see or hear it differently. Whether a discrepancy pertains
16 to a fact of importance or only to a trivial detail should
17 be considered in weighing its significance.

18
19 INSTRUCTION NO. 13:

20
21 The fact that a witness has been convicted of a
22 felony, if such be a fact, may be considered by you only for
23 the purpose of determining the credibility of that witness.
24 The fact of such a conviction does not necessarily destroy or
25 impair the witness' credibility. It is one of the

1 circumstances that you may take into consideration in
2 weighing the testimony of such a witness.

3
4 INSTRUCTION NO. 14:

5
6 A statement made by a defendant other than at his
7 trial may be either an admission or a confession.

8 An admission is a statement by a defendant, which by
9 itself is not sufficient to warrant an inference of guilt, but
10 which tends to prove guilt when considered with the rest of
11 the evidence.

12 A confession is a statement by a defendant which
13 discloses his intentional participation in the criminal act for
14 which he is on trial and which discloses his guilt of that
15 crime.

16 You are the exclusive judges as to whether an
17 admission or a confession was made by the defendant and if the
18 statement is true in whole or in part. If you should find
19 that such statement is entirely untrue, you must reject it.
20 If you find it is true in part, you may consider that part
21 which you find to be true.

22 Evidence of an oral admission or an oral confession
23 of the defendant ought to be viewed with caution.

1 INSTRUCTION NO. 15:

2
3 In regard to the preceding instruction you are
4 reminded that Exhibit No. 49, as I told you at the time the
5 Exhibit was admitted, may be considered by you only for the
6 limited purpose of testing the credibility of the defendant
7 as a witness when he testified on the witness stand during the
8 trial. This Exhibit was not admitted as an admission or
9 confession and must not be considered by you as evidence of
10 the truth of the facts as stated therein or as proof of the
11 defendant's guilt.

12
13 INSTRUCTION NO. 16:

14
15 No person may be convicted of a criminal offense
16 unless there is some proof of each element of the crime
17 independent of any confession or admission made by him outside
18 of this trial.

19 The identity of the person who is alleged to have
20 committed a crime is not an element of the crime nor is the
21 degree of the crime. Such identity or degree of the crime may
22 be established by an admission or confession.

1 INSTRUCTION NO. 17:

2
3 A conviction may not be had upon the testimony of
4 an accomplice unless it be corroborated by such other evidence
5 as shall tend to connect the defendant with the commission
6 of the offense.

7
8 INSTRUCTION NO. 18:

9
10 An accomplice is one who is liable to be
11 prosecuted for the identical offense charged against the
12 defendant on trial.

13 To be an accomplice, the person must have
14 knowingly and with criminal intent aided, promoted,
15 encouraged, or instigated by act or advice, or by act and
16 advice, the commission of such offense.

17
18 INSTRUCTION NO. 19:

19
20 Merely assenting to or aiding or assisting in
21 the commission of a crime without guilty knowledge or intent
22 is not criminal, and a person so assenting to, or aiding, or
23 assisting in, the commission of a crime without guilty
24 knowledge or intent in respect thereto, is not an accomplice
25 in the commission of such crime.

1 INSTRUCTION NO. 20:

2

3 Corroborative evidence is evidence of some act or
4 fact related to the offense which, if believed, by itself and
5 without any aid, interpretation or direction from the
6 testimony of the accomplice, tends to connect the defendant
7 with the commission of the offense charged.

8 However, it is not necessary that the corroborative
9 evidence be sufficient in itself to establish every element
10 of the offense charged, or that it corroborate every fact to
11 which the accomplice testifies.

12 In determining whether an accomplice has been
13 corroborated, you must first assume the testimony of the
14 accomplice has been removed from the case. You must then
15 determine whether there is any remaining evidence which tends
16 to connect the defendant with the commission of the offense.

17 If there is not such independent evidence which
18 tends to connect defendant with the commission of the offense,
19 the testimony of the accomplice is not corroborated.

20 If there is such independent evidence which you
21 believe, then the testimony of the accomplice is corroborated.
22 But before you may convict the defendant you must find from
23 all the evidence that it carries the convincing force
24 required by law.

25

1 INSTRUCTION NO. 21:

2
3 It is the law that the testimony of an accomplice
4 ought to be viewed with distrust. This does not mean that
5 you may arbitrarily disregard such testimony, but you should
6 give to it the weight to which you find it to be entitled
7 after examining it with care and caution and in the light of
8 all the evidence in the case.

9
10 INSTRUCTION NO. 22:

11
12 Evidence has been received tending to show that
13 the defendant may have committed crimes other than that for
14 which he is on trial.

15 Such evidence was not received and may not be
16 considered by you to prove that he is a person of bad
17 character or that he has a disposition to commit crimes.

18 Such evidence was received and may be considered
19 by you only for the limited purpose of determining if it tends
20 to show:

21 1. The mental state of the defendant at the time
22 of the alleged offense for which he is on trial and at the
23 time of his arrest for that offense.

24 2. The identity of the person who committed the
25 crime, if any, of which the defendant is accused;

1 3. The existence of the intent which is a
2 necessary element of the crime charged.

3 4. That the defendant had knowledge or possessed
4 the means that might have been useful or necessary for the
5 commission of the crime charged.

6 For the limited purpose for which you may consider
7 such evidence, you must weigh it in the same manner as you do
8 all other evidence in the case.

9 You are not permitted to consider such evidence
10 for any other purpose.

11
12 INSTRUCTION NO. 23:

13
14 Where the case of the State rests substantially
15 or entirely on circumstantial evidence, you are not permitted
16 to find the defendant guilty of the crime charged against him
17 unless the proved circumstances are not only consistent with
18 the theory that the defendant is guilty of the crime, but
19 cannot be reconciled with any other rational conclusion and
20 each fact which is essential to complete a set of
21 circumstances necessary to establish the defendant's guilt has
22 been proved beyond a reasonable doubt.

23 Also, if the evidence is susceptible of two
24 reasonable interpretations, one of which points to the
25 defendant's guilt and the other to his innocence, it is your

1 duty to adopt that interpretation which points to the
2 defendant's innocence, and reject the other which points to his
3 guilt. If, on the other hand, one interpretation of the
4 evidence appears to you to be reasonable and the other
5 interpretation to be unreasonable, it would be your duty to
6 accept the reasonable interpretation and to reject the
7 unreasonable.

8
9 INSTRUCTION NO. 24:

10
11 The defendant, Thomas Eugene Creech, is here upon
12 trial on an Information filed in this Court by the Prosecuting
13 Attorney of Valley County, Idaho, charging the defendant with
14 the crime of Murder in the First Degree.

15 The charging part of said Information reads as
16 follows:

17 COUNT I: "That the said defendant, Thomas Eugene
18 Creech, on or about the 4th day of November, 1974, at and in the
19 County of Valley, State of Idaho, then and there being, did
20 then and there knowingly, wilfully, unlawfully, intentionally,
21 feloniously and deliberately with premeditation and malice
22 aforethought and the intent then and there had to kill and
23 murder one Edward Thomas Arnold with a certain High Standard 22
24 Caliber Automatic pistol bearing Serial No. 366934, then and
25 there held in his, the said defendant's hand, and then and

1 there loaded, did then and there wilfully, unlawfully,
2 knowingly, intentionally, feloniously and of his own deliberate
3 and premeditated malice aforethought with intent to kill and
4 murder the said Edward Thomas Arnold, a human being, as
5 aforesaid, aim, shoot, and discharge the said loaded pistol so
6 that the said Edward Thomas Arnold was struck in the head by
7 the bullet from the said pistol shot and discharged at him by
8 said Thomas Eugene Creech, mortally wounding said
9 Edward Thomas Arnold from which mortal wound he sickened and
10 died at Valley County, Idaho, on the 4th day of November,
11 1974."

12 COUNT II: "That the said defendant, Thomas Eugene
13 Creech, on or about the 4th day of November, 1974, at and in
14 the County of Valley, State of Idaho, then and there being did
15 then and there knowingly, wilfully, unlawfully, intentionally,
16 feloniously and deliberately with premeditation and malice
17 aforethought and the intent then and there had to kill and
18 murder one John Wayne Bradford with a certain High Standard 22
19 Caliber Automatic pistol bearing Serial No. 366934, then and
20 there held in his, the said defendant's hand, and then and
21 there loaded, did then and there wilfully, unlawfully,
22 knowingly, intentionally, feloniously and of his own
23 deliberate and premeditated malice aforethought with intent to
24 kill and murder the said John Wayne Bradford, a human being,
25 as aforesaid, aim, shoot and discharge the said loaded pistol

1 so that the said John Wayne Bradford was struck in the head by
2 three bullets from the said pistol shot and discharged at him
3 by said Thomas Eugene Creech, mortally wounding said
4 John Wayne Bradford, from which mortal wound he sickened and
5 died at Valley County, Idaho, on the 4th day of November, 1974."

6 "All of which is contrary to the form of the statute
7 in such case made and provided and against the peace and dignity
8 of the State of Idaho."

9 The defendant has heretofore entered a plea of
10 "not guilty" to the charges set forth in the Information.

11
12 INSTRUCTION NO. 25:

13
14 Each count charges a separate and distinct offense.
15 You must decide each count separately on the evidence and the
16 law applicable to it, uninfluenced by your decision as to any
17 other count. The defendant may be convicted or acquitted on
18 any or all of the offenses charged. Your finding as to each
19 count must be stated in a separate verdict.
20
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25

1 INSTRUCTION NO. 26:

2
3 A defendant in a criminal action is presumed to be
4 innocent until the contrary is proved, and in case of a
5 reasonable doubt whether his guilt is satisfactorily shown, he
6 is entitled to an acquittal, but the effect of this
7 presumption is only to place upon the State the burden of
8 proving him guilty beyond a reasonable doubt. Reasonable
9 doubt is defined as follows: It is not a mere possible doubt;
10 because everything relating to human affairs, and depending
11 on moral evidence, is open to some possible or imaginary doubt.
12 It is that state of the case which, after the entire comparison
13 and consideration of all the evidence, leaves the minds of the
14 jurors in that condition that they cannot say they feel an
15 abiding conviction, to a moral certainty, of the truth of the
16 charge.

17
18 INSTRUCTION NO. 27:

19
20 Before you may convict the defendant of the crime
21 charged against him by the Information, you should require the
22 prosecution to prove every material allegation contained in the
23 Information beyond a reasonable doubt; and if, after a
24 consideration of all the evidence in the case, you entertain
25 a reasonable doubt of the truth of any of these material

1 allegations, then it is your duty to give the defendant the
2 benefit of such doubt and acquit him.

3 Probabilities, or that the greater weight or
4 preponderance of the evidence supports the allegations of the
5 information, will not support a conviction.

6
7 INSTRUCTION NO. 28:

8
9 If you are not satisfied beyond a reasonable doubt
10 that the defendant is guilty of the offense charged, he may,
11 however, be found guilty of any lesser offense, the
12 commission of which is necessarily included in the offense
13 charged, if the evidence is sufficient to establish his guilt
14 of such lesser offense beyond a reasonable doubt.

15 The offense of Murder in the First Degree with
16 which the defendant is charged necessarily includes the
17 lesser offenses of Murder in the Second Degree and Voluntary
18 Manslaughter.

19
20 INSTRUCTION NO. 29:

21
22 Murder is the unlawful killing of a human being
23 with malice aforethought.

24 Such malice may be express or implied. It is
25 express when there is manifested a deliberate intention

1 unlawfully to kill a human being. It is implied when no
2 considerable provocation appears, or when the circumstances
3 attending the killing show an abandoned and malignant heart.
4 An abandoned and malignant heart is a condition of heart and
5 mind having no regard for social and moral obligations. Malice
6 is implied when the killing results from an act involving a
7 high degree of probability that it will result in death, which
8 act is done for a base, antisocial purpose and with a wanton
9 disregard for human life.

10 Malice aforethought does not necessarily imply a
11 pre-existing hatred or enmity toward the person killed.

12 "Aforethought" does not imply deliberation or the
13 lapse of considerable time. It only means that the required
14 mental state must precede rather than follow the act.

15
16 INSTRUCTION NO. 30:

17
18 All murder which is perpetrated by any kind of wilful
19 deliberate and premeditated killing with malice aforethought is
20 murder of the first degree.

21 The word "deliberate" means formed or arrived at or
22 determined upon as a result of careful thought and weighing of
23 considerations for and against the proposed course of action.
24 The word "premeditated" means thought over beforehand.

25 If you find that the killing was preceded and

1 accompanied by a clear, deliberate intent on the part of the
2 defendant to kill, which was the result of deliberation and
3 premeditation, so that it must have been formed upon
4 pre-existing reflection and not under a sudden heat of passion
5 or other condition, precluding the idea of deliberation, it is
6 murder of the first degree.

7 The law does not undertake to measure in units of
8 time the length of the period during which the thought must be
9 pondered before it can ripen into an intent to kill which is
10 truly deliberate and premeditated. The time will vary with
11 different individuals and under varying circumstances. The
12 true test is not the duration of time, but rather the extent
13 of the reflection. A cold, calculated judgment and decision
14 may be arrived at in a short period of time, but a mere
15 unconsidered and rash impulse, even though it includes an
16 intent to kill, is not such deliberation and premeditation as
17 will fix an unlawful killing as murder of the first degree.
18 To constitute a deliberate and premeditated killing, the slayer
19 must weigh and consider the question of killing and the
20 reasons for and against such a choice and, having in mind the
21 consequences, decide to and commit the unlawful act causing
22 death.

1 INSTRUCTION NO. 31:

2
3 Murder of the second degree is the unlawful
4 killing of a human being with malice aforethought when there is
5 manifested an intention unlawfully to kill a human being but
6 the evidence is insufficient to establish deliberation and
7 premeditation.

8
9 INSTRUCTION NO. 32:

10
11 Murder of the second degree is also the unlawful
12 killing of a human being as the direct causal result of an
13 act involving a high degree of probability that it will result
14 in death, which act is done for a base, antisocial purpose and
15 with wanton disregard for human life.

16 When the killing is the direct result of such an
17 act, it is not necessary to establish that the defendant
18 intended that his act would result in the death of a human
19 being.

20
21 INSTRUCTION NO. 33:

22
23 Voluntary manslaughter is the intentional and
24 unlawful killing of a human being without malice aforethought.

25 There is no malice aforethought if the killing

1 occurred upon a sudden quarrel or heat of passion.

2

3 INSTRUCTION NO. 34:

4

5 The distinction between murder and manslaughter is
6 that murder requires malice while manslaughter does not.

7 When the act causing the death, though unlawful, is
8 done in the heat of passion or is excited by a sudden quarrel
9 such as amounts to adequate provocation, the offense is
10 manslaughter. In such a case, even if an intent to kill exists,
11 the law is that malice, which is an essential element of
12 murder, is absent.

13

14 INSTRUCTION NO. 35:

15

16 To reduce an intentional felonious homicide from
17 the offense of murder to manslaughter upon the ground of sudden
18 quarrel or heat of passion, the provocation must be of such
19 character and degree as naturally would excite and arouse
20 such passion, and the assailant must act under the smart of
21 that sudden quarrel or heat of passion.

22 "Heat of passion", as the term is used in our law,
23 means such passion as naturally would be aroused in the mind of
24 an ordinarily reasonable person of average disposition in the
25 same or similar circumstances as those in question, and such

1 as would cause him to act rashly, without reflection and
2 deliberation, and from passion rather than from judgment.
3 Hence the defendant may not set up his own standard of conduct
4 and be permitted to justify or excuse himself merely because
5 his passions were aroused. To apply the proper standard by
6 which to judge the conduct of the defendant, you will ask and
7 answer whether or not the ordinarily reasonable person, if
8 placed in the same position in which the defendant found
9 himself and if knowing what the defendant then knew, would
10 have been thrown into a heat of passion.

11 If there was provocation, but of a nature not
12 calculated to naturally arouse passion, or if sufficient time
13 lapsed between the provocation and the fatal blow for passion
14 to subside and reason to return, and if an unlawful killing of
15 a human being followed such provocation, and had all the
16 elements of murder, as I have defined it, the mere fact of
17 slight or remote provocation will not reduce the offense to
18 manslaughter.

19
20 INSTRUCTION NO. 36:
21

22 Neither the emotion of fear, of itself, nor the
23 emotion for revenge, of itself, nor any or all of these
24 emotional states, in and of themselves, constitute the heat of
25 passion referred to in the law of manslaughter which I have

1 stated to you. Any or all of such specific emotions may be
2 involved in a heat of passion that causes judgment to give way
3 to impulse and rashness, but also any one or more of them may
4 exist in the mind of a person who acts deliberately and from
5 choice following his own reasoning howsoever good or bad it
6 may be. Hence the law sets up the standard and requires the
7 test that I previously have stated to you for determining
8 whether or not the defendant acted under heat of passion.

9
10 INSTRUCTION NO. 37:
11

12 To reduce a killing upon a sudden quarrel or heat
13 of passion from murder to manslaughter the killing must have
14 occurred while the slayer was acting under the direct and
15 immediate influence of such quarrel or heat of passion. Where
16 the influence of the sudden quarrel or heat of passion has
17 ceased to obscure the mind of the accused and sufficient time
18 has elapsed for angry passion to end and for reason to control
19 his conduct, it will no longer reduce an intentional killing to
20 manslaughter. The question as to whether the cooling period
21 has elapsed and reason has returned is not measured by the
22 standard of the accused, but the duration of the cooling period
23 is the time it would take the average or ordinarily reasonable
24 person to have cooled his heat of passion and for his reason to
25 have returned.

1 INSTRUCTION NO. 38:

2

3 To constitute murder or manslaughter there must be,
4 in addition to the death of a human being, an unlawful act
5 which was a proximate cause of that death.

6 The proximate cause of a death is a cause which,
7 in natural and continuous sequence, produced the death, and
8 without which the death would not have occurred.

9

10 INSTRUCTION NO. 39:

11

12 Notive is not an element of the crime charged and
13 need not be shown. However, you may consider motive or lack of
14 motive as a circumstance in this case. Presence of motive
15 may tend to establish guilt. Absence of motive may tend to
16 establish innocence. You will therefore give its presence
17 or absence, as the case may be, the weight to which you find
18 it to be entitled.

19

20 INSTRUCTION NO. 40:

21

22 Before you may return a verdict in this case, you
23 must agree unanimously not only as to whether the defendant is
24 guilty or not guilty, but also, if you should find him guilty
25 of an unlawful killing, you must agree unanimously as to

1 whether he is guilty of murder of the first degree or murder
2 of the second degree or manslaughter.

3
4 INSTRUCTION NO. 41:

5
6 If you are convinced beyond a reasonable doubt that
7 the crime of murder has been committed by a defendant, but you
8 have a reasonable doubt whether such murder was of the first
9 or the second degree, you must give to such defendant the
10 benefit of that doubt and return a verdict fixing the murder
11 as of the second degree.

12
13 INSTRUCTION NO. 42:

14
15 When the evidence shows the existence of provocation
16 that played a part in inducing the unlawful killing of a human
17 being, but also shows that such provocation was not such as to
18 reduce the homicide to manslaughter, and the jury finds that
19 the killing was murder, they may consider the evidence of
20 provocation for such bearing as it may have on the question
21 whether the murder was of the first or second degree.

1 INSTRUCTION NO. 43:

2
3 If you are satisfied beyond a reasonable doubt that
4 the killing was unlawful, but you have a reasonable doubt
5 whether the crime is murder or manslaughter, you must give the
6 defendant the benefit of such doubt and find it to be
7 manslaughter rather than murder.

8
9 INSTRUCTION NO. 44:

10
11 Upon a trial of a charge of murder, it is a defense
12 that the killing was justifiable and not unlawful.

13 If you have a reasonable doubt whether the killing
14 was unlawful you must give the defendant the benefit of such
15 doubt and acquit him.

16
17 INSTRUCTION NO. 45:

18
19 Homicide is justifiable and not unlawful when
20 committed by a person in the lawful defense of himself or any
21 other person, when he has reasonable ground to apprehend that
22 he or such other person is in danger of death or great bodily
23 injury and that there is imminent danger of such a design being
24 accomplished.

25 In order to justify the taking of human life in

1 self-defense, the slayer, as a reasonable man, must have
2 reason to believe and must believe that he or such other person
3 is in danger of death or of great bodily injury; and further,
4 the circumstances must be such that an ordinarily reasonable
5 person, under similar circumstances would believe that it was
6 necessary for him to use in his or the other person's defense
7 and to avoid death or great bodily injury to himself or such
8 other person, such force or means as might cause the death of
9 his adversary.

10 A bare fear of death or great bodily injury is not
11 sufficient to justify a homicide. To justify taking the
12 life of another in self-defense, the circumstances must be
13 such as to excite the fears of a reasonable man placed in a
14 similar position, and the party killing must act under the
15 influence of such fears alone. The danger must be apparent
16 and must be present and imminent, or must so appear at the
17 time to the slayer as a reasonable man, and the killing must be
18 done under a well-founded belief that it is necessary to save
19 one's self or another person from death or great bodily harm.

20
21 INSTRUCTION NO. 46:

22
23 The defendant in this case has introduced evidence
24 tending to show that he was not present at the time and place
25 of the commission of the alleged offense for which he is here

1 on trial. If, after a consideration of all the evidence, you
2 have a reasonable doubt that the defendant was present at the
3 time the crime was committed, he is entitled to an acquittal.
4

5 INSTRUCTION NO. 47:
6

7 In this case the defendant has interposed the
8 defense that he was suffering from a mental disease or defect
9 as a result of which he lacked the capacity to either appreciate
10 the wrongfulness of his conduct, or to conform his conduct to
11 the requirements of the law. The law does not place upon a
12 defendant the burden of proving beyond a reasonable doubt that
13 he was not mentally responsible for his conduct at the time
14 the act charged was committed, but only places the burden upon
15 him to raise in your minds a reasonable doubt as to his mental
16 responsibility. If there is in your mind a reasonable doubt
17 as to the sanity of the defendant at the time of the
18 commission of the act alleged in the Information then this
19 reasonable doubt must be resolved in his favor and you must
20 acquit him of the crime charged.
21

22 INSTRUCTION NO. 48:
23

24 A person is not responsible for criminal conduct, if
25 at the time of such conduct, as a result of mental disease or

1 defect, he lacks substantial capacity either to appreciate the
2 wrongfulness of his conduct, or, to conform his conduct to
3 the requirements of the law. Such mental disease or defect
4 defines the term insanity for purposes of criminal responsibility,
5 and is the meaning of the term insanity as used in these
6 instructions.

7 You will note that under this definition there are
8 two types of mental disease or defect which will excuse conduct
9 which would otherwise be criminal. The first is that at the
10 time of the commission of the act the accused lacked
11 substantial capacity to appreciate the wrongful nature of his
12 conduct. The tests are: Did he have sufficient mental
13 capacity to appreciate the character and quality of his
14 wrongful act? Did he know and understand that it was a
15 violation of the rights of another and in itself wrong?

16 The second type of insanity is a mental disease
17 or defect of such nature that at the time of the conduct in
18 question it prevented the defendant from conforming his
19 conduct to the requirements of the law, even though he had
20 substantial capacity to appreciate the wrongfulness of his
21 conduct.

22 The mental disease or defect must be of a
23 substantial nature before it will excuse one from
24 responsibility for his conduct. Repeated criminal or antisocial
25 conduct, standing alone, does not establish a mental defect or

1 disease which will excuse responsibility for wrongful conduct.

2
3 INSTRUCTION NO. 49:
4

5 The law presumes every man to be sane and to possess
6 a sufficient degree of reason to be responsible for his criminal
7 conduct until evidence is presented sufficient to raise in the
8 minds of the jury a reasonable doubt as to the mental
9 responsibility of the accused.

10 This presumption of mental responsibility
11 prevails only until a reasonable doubt is cast upon it, and the
12 presumption merely relieves the prosecution from introducing
13 proof that the defendant was free of mental disease or defect
14 which affected his responsibility until that issue is raised
15 by evidence creating a reasonable doubt as to the sanity of
16 the accused.

17 If evidence tending to establish such mental
18 disease or defect is presented, the ultimate burden of
19 convincing the jury beyond a reasonable doubt that defendant
20 was within the legal test of responsibility is on the
21 prosecution.
22
23
24
25

1 INSTRUCTION NO. 50:

2
3 In determining the question whether the defendant
4 was responsible for his conduct at the time of the alleged
5 commission of the act, the jury may consider all of his acts
6 at the time of, before, and since the alleged commission of
7 the act, as such acts and conduct have been shown by the
8 evidence, and the jury has the right to consider the
9 defendant's appearance and actions during the trial as a
10 circumstance in determining his mental capacity at the time of
11 the alleged commission of the act.
12

13 INSTRUCTION NO. 51:

14
15 You are instructed that if you decide to acquit the
16 defendant on the ground that because of mental disease or
17 defect he lacked substantial capacity either to appreciate
18 the wrongfulness of his conduct, or, to conform his conduct
19 to the requirement of the law, your verdict must be "Not
20 Guilty by Reason of Insanity."
21
22
23
24
25

1 INSTRUCTION NO. 52:

2
3 During your examination as prospective jurors you
4 learned that in Idaho the Legislature has provided an automatic
5 and mandatory death penalty for First Degree Murder. You are
6 hereby advised that the death penalty is in no way applicable
7 to a conviction for the lesser offenses of Murder in the
8 Second Degree or Voluntary Manslaughter.

9 Even though you have knowledge of the foregoing
10 facts, you are instructed that it is not within your province
11 to concern yourselves with the question of penalty or
12 punishment. That feature of the case is one solely for the
13 Legislature as to First Degree Murder and solely for the Court
14 as to Murder in the Second Degree and Voluntary Manslaughter.
15 Therefore, I instruct you not to concern yourselves with the
16 question of penalty or punishment. Your duty as jurors is
17 solely to determine the guilt or innocence of the accused and
18 upon that question and that question alone you, as jurors, are
19 to vote and return your verdict.

20
21 INSTRUCTION NO. 53:

22
23 The Court has endeavored to give you instructions
24 embodying all rules of law that may become necessary in
25 guiding you to a just and lawful verdict. The applicability

1 of some of these instructions will depend upon the conclusions
2 you reach as to what the facts are. As to any such
3 instructions, the fact that it has been given must not be taken
4 as indicating an opinion of the Court that the instruction will
5 be necessary or as to what the facts are. If an instruction
6 applies only to a state of facts which you find does not
7 exist, you will disregard the instruction.

8
9 INSTRUCTION NO. 54:

10
11 The attitude and conduct of jurors at the beginning
12 of their deliberations are matters of considerable importance.
13 It is rarely productive of good for a juror at the outset
14 to make an emphatic expression of his opinion on the case or
15 to state how he intends to vote. When one does that at the
16 beginning, his sense of pride may be aroused, and he may
17 hesitate to change his position even if shown that it is
18 wrong. Remember that you are not partisans or advocates in
19 this matter, but are judges.

20
21 INSTRUCTION NO. 55:

22
23 Both the State and the defendant are entitled to
24 the individual opinion of each juror.

25 It is the duty of each of you to consider the

1 evidence for the purpose of arriving at a verdict if you can do
2 so. Each of you must decide the case for yourself, but should
3 do so only after a discussion of the evidence and instructions
4 with the other jurors.

5 You should not hesitate to change an opinion if you
6 are convinced it is erroneous. However, you should not be
7 influenced to decide any question in a particular way because
8 a majority of the jurors or any of them, favor such a decision.

9
10 INSTRUCTION NO. 56:
11

12 Upon retiring to the jury room you will select one
13 of your number as foreman.

14 This being a criminal case, your verdict must be
15 unanimous. When you arrive at a verdict, the foreman will
16 sign it and you will return it into open court.

17 In arriving at your verdict you should not resort
18 to any means or methods of chance.

19 Forms of verdict suitable to any conclusion you may
20 reach will be submitted to you with these instructions.

21 DATED this 21st day of October, 1975.

22 /S/ J. Ray Durtschi, District Judge.
23
24
25

1 November 3, 1975

4:10 p.m.

2 THE COURT: This is the time scheduled for further
3 proceedings in the case of the State of Idaho vs Thomas Eugene
4 Creech. I understood at the last proceedings in Shoshone
5 County that the defendant was willing to waive his right to
6 have these proceedings had in Shoshone County, is that correct,
7 Mr. Robinson?

8 MR. ROBINSON: That's correct, Your Honor.

9 THE COURT: Mr. Creech, do you agree to these proceedings
10 here in Ada County?

11 MR. CREECH: Yes, sir.

12 THE COURT: I note that there has now been filed several
13 motions by the defendant; motion for new trial, motion to set
14 aside verdict, motion for appointment as court-appointed
15 counsel. These were just filed today and haven't been noted
16 for hearing. Of course it would be appropriate that these
17 matters be heard before any further proceedings are had. What
18 do counsel desire as far as further proceedings on these matters
19 Mr. Robinson?

20 MR. ROBINSON: I'm prepared to go ahead at this time,
21 Your Honor.

22 MR. REMAKLUS: We're prepared to proceed, Your Honor.

23 THE COURT: You're prepared to hear all of these motions
24 today?

25 MR. REMAKLUS: Yes, Your Honor.

1 THE COURT: Are you prepared to argue today, Mr.
2 Robinson?

3 MR. ROBINSON: Yes, I am, Your Honor, with the one
4 exception, on the motion for setting aside the verdict we
5 would and are preparing and desire to file a memorandum in
6 support of that motion.

7 THE COURT: How long do you want to complete your
8 memorandum on that motion?

9 MR. ROBINSON: On that motion, Your Honor, it will take
10 us approximately one week, seven days to have that done.

11 THE COURT: Counsel want an opportunity to respond to
12 that memorandum?

13 MR. REMAKLUS: Yes, Your Honor.

14 THE COURT: All right, how long do counsel want to take
15 to respond?

16 MR. REMAKLUS: Seven days will be fine, Your Honor.

17 THE COURT: Counsel, do you want to reply to their
18 answering memorandum, Mr. Robinson?

19 MR. ROBINSON: Yes, Your Honor, and I can do that within
20 three days.

21 THE COURT: All right, I'll allow counsel those lengths
22 of time for their respective memoranda on this point, on this
23 motion. I'll continue the hearing on that particular motion
24 to December 4th at 3:30.

25 All right, I'll hear your argument on the other

1 two motions then. Do you want to present those jointly, Mr.
2 Robinson, at this time --

3 MR. ROBINSON: Yes, sir.

4 THE COURT: -- motion for new trial and for appointment
5 of counsel?

6 MR. ROBINSON: Yes, sir. First of all, Your Honor, I
7 filed a motion for the new trial based upon the four grounds,
8 the first of which the Court ruled upon in a pre-trial
9 proceedings, that is of dispensing the jury and trying this
10 matter to the Court which I believe that we have already filed
11 memorandum on, and are moving the Court at this time in regard
12 to the new trial to reconsider the previous motion and reconsider
13 the memorandum that has been filed.

14 The second is for allowing the jurors to be
15 challenged or dismissed for cause based solely upon their non-
16 belief in the capital punishment, some of which were passed.
17 I'm sure the record shows, Your Honor, in Wallace, based upon
18 mutual stipulation. Mutual stipulation sometimes going to
19 other factors regarding individual jurors, but over the
20 objection of defense counsel, on, I think, two or three that
21 occurred during the first three days in the selection of the
22 jury, and we have filed our memorandum and citations today,
23 Your Honor, and I'm not sure whether the State desires to
24 respond to that written memorandum.

25 And for the third cause, denial after the offer of

1 proof to go into the testimony regarding the admission of the
2 Satanic Bible and the giving of testimony of the clergy, and
3 others, on their realism of God and the existence of Satan;

4 And for the denial, after the offer of proof,
5 before admission of the testimony of the polygraph examiner
6 and results of his polygraph examination. That we have not
7 filed a written memorandum with the Court as yet. That is a
8 matter that was discussed and considered by the Court during
9 the period of trial in Wallace. We do submit the motion for
10 new trial and the memorandum that we have filed today for
11 the Court's consideration.

12 On the other motion for appointment of court-
13 appointed counsel, Your Honor, I'm sure that you, Judge
14 Durtschi, are well aware of the entire aspects of this case
15 that took place from November of 1974 up to and including the
16 time that was previously scheduled for trial in Cascade with
17 Ward Hower as court-appointed counsel and my subsequent coming
18 into the case June the 6th of this year, 1975; and we were
19 acting at that time or I was acting at that time and through
20 the trial that occurred in Wallace on a retained basis,
21 retained basis not having to do with my financial remuneration
22 whatsoever but rather the case having been taken for providing
23 this defendant a fair trial in all of the charges that were
24 filed against him which included many aspects of the publicity
25 that had been released and published prior to this trial and

1 prior to my admission into the case.

2 We are at a point however at this time, Your
3 Honor, when appeals are necessary and will follow as a matter
4 of course, must follow as a matter of course regarding the
5 verdict and the sentence that will be pronounced by this Court.
6 It has been an extreme financial hardship worked upon the
7 professional association that I now have with Mr. Robert Jones,
8 and for this reason we have moved the Court for appointment
9 for further representation of Mr. Thomas Eugene Creech as court-
10 appointed counsel so that the normal minimal fees allowed would
11 be provided for further representation. The transcript of this
12 case being a lengthy case would be paid for also by the State
13 on appeal to the Idaho Supreme Court and such other courts as
14 might an appeal be taken to.

15 I have filed in conjunction with that motion, Your
16 Honor, my affidavit that sets these matters forth to and
17 including the sum total that has been compiled by my office
18 of the expenditures that have been made in excess of \$11,000.00.

19 The other motion as the Court has already indicated,
20 the motion to set aside the verdict will be heard then December
21 the 4th after the memorandum as counsel has advised the Court.

22 MR. REMAKLUS: Your Honor, of course on point number one
23 it was taken care of up in Wallace when the defendant asked to
24 dispense the jury and Your Honor has already ruled on that.

25 Point number two, for jurors to be challenged on

1 non-belief and capital punishment, I don't believe is a fair
2 statement of what happened in Wallace, Idaho in the jury
3 selection.

4 As far as the Satanic Bible, and for the same
5 reason that this testimony was not admitted was never shown
6 to be relevant and material. Certainly no foundation was
7 ever laid for any such testimony as to the Satanic Bible or
8 the realism of God and the existence of Satan.

9 And of course the Courts of Idaho have never
10 allowed polygraph examinations to be introduced in evidence.
11 And in addition thereto as you will recall the examiner who
12 was on the stand was not a qualified examiner anyway.

13 I think on all four points that the motion for
14 new trial should be denied.

15 I'm really not prepared to respond to the affidavit
16 in support of a motion for court-appointed counsel. That's
17 what we have the office of the public defender in Valley County
18 for, is to represent indigent defendants, and I think we have
19 gotten into maybe a cross fire here with the public defender
20 retired from this case sometime ago, but I would think that
21 very careful consideration should be given any appointment
22 of court-appointed counsel and certainly if our county is going
23 to now have to come in and start paying counsel if would only
24 be from this point forward and certainly nothing in the past,
25 Your Honor.

1 Thank you.

2 MR. ROBINSON: On that point, Your Honor, may the
3 record be clear that I'm not asking for reimbursement of my
4 past expenditures that my office has made, and the motion for
5 appointment of court-appointed counsel would only be for any
6 services from this point forward.

7 THE COURT: I think all of the grounds for motion for
8 new trial have heretofore been considered in some detail in
9 connection with the trial of this action except the one point
10 perhaps of dismissal of all jurors for objection to capital
11 punishment. For the other grounds I'm going to deny the
12 motion for the same reasons that these matters were not
13 permitted into evidence at the time of trial. I think the
14 same reasons still hold true and would adhere to the ruling
15 of the trial court on these issues prior to trial and during
16 the course of the trial.

17 My recollection, as far as the other point on the
18 jurors dismissed for objection to capital punishment is that
19 no juror was excused solely for personal objection or opposition
20 to capital punishment. In fact it is my recollection that
21 several jurors we had on the jury, at least there were some
22 that were passed, I didn't keep track on the challenges--
23 pre-emptory challenges whether all of these finally were
24 discharged on pre-emptory challenges or not, but there were
25 several that were retained for cause who did have personal

1 objection to the death penalty and capital punishment. As I
2 recall the two instances where defense counsel's challenge was
3 overruled the panel members not only expressed opposition to
4 the capital punishment but also indicated very clearly that
5 they couldn't fairly consider the issue of guilt or innocence
6 under the mandatory capital punishment statute because of
7 their opposition to capital punishment. As I recall, all
8 jurors who were opposed to capital punishment but still felt
9 in spite of that opposition they could fairly consider the
10 issue of guilt or innocence were retained on the jury panel,
11 at least for cause, and my understanding of the case cited by
12 counsel did not preclude challenge where the feeling is so
13 strong against capital punishment that it would impair or
14 prevent a juror from fairly considering the issue of guilt or
15 innocence so that a juror would not vote for guilt under any
16 state of the evidence, and it is my recollection that these
17 two jurors were excused over--or excuse me--that the two
18 challenges that were denied fell into that category, so I'm
19 going to deny the motion for new trial in all respects.

20 On the other motion, the motion for appointment
21 of counsel, of course the record shows that at one point in
22 this proceeding the defendant did have court-appointed counsel
23 in accordance with the statutory procedure that has been adopted
24 by Valley County to have a public defender system. That public
25 defender was permitted to withdraw and counsel, privately

1 retained counsel was substituted instead of the public
2 defender. I frankly feel obligated if I were to appoint
3 counsel at this time to reappoint the public defender because
4 that's the provision that Valley County has made for represent-
5 tation for needy defendants, and I feel that it really would
6 be unfair to ask an attorney to come back into the case
7 after he has been replaced for purpose of trial to handle the
8 appeal, so I'm simply going to deny the motion for appointment
9 of counsel and deny any leave for you to withdraw, Mr.
10 Robinson, and require you to continue to represent the
11 defendant on his appeal in this matter and all further
12 proceedings. I do that without prejudice to the defendant
13 making a showing in support of request to have the County pay
14 for the transcript in this matter. Upon a proper showing of
15 indigency by the defendant as far as payment for the transcript
16 I would entertain a motion to require the County to pay for
17 the transcript.

18 MR. ROBINSON: That, Your Honor, is what I was getting
19 to before.

20 I do accept the continued representation of Mr.
21 Thomas Eugene Creech for purposes of appeal. I do at this
22 time move the Court for allowance for the transcript of the
23 case to be furnished without cost to the defendant for the
24 reasons that I have stated. The cost would be prohibitive
25 to the continued representation of our professional association.

1 THE COURT: I would like the record to be supported by
2 affidavit by the defendant in that regard. I think that is
3 customary.

4 MR. ROBINSON: All right, Your Honor, I'll have that
5 prepared and filed with the Court.

6 THE COURT: Any opposition to that?

7 MR. REMAKLUS: No. No opposition to the motion after
8 the showing made by the defendant's attorney, Your Honor.

9 THE COURT: All right, the remaining motion then will
10 be continued for argument to December the 4th at 3:30 and
11 all further proceedings of this matter will be continued to
12 December 4th at 3:30.

13 The defendant is remanded to the custody of the
14 Ada County Sheriff.

15 MR. ROBINSON: From that, Your Honor, is it my under-
16 standing that Mr. Creech will be held here in the Ada County
17 Jail for that period of time until the motion on December the
18 4th has been heard?

19 THE COURT: Yes, unless some other motion for other
20 custodial arrangements.

21 MR. ROBINSON: No, sir.

22 THE COURT: We will be in recess then.

23
24 E N D
25

1 BOISE, IDAHO, THURSDAY, DECEMBER 4, 1975, 3:30 P.M.

2
3
4 THE COURT: I'm going to take up State versus Creech
5 first.

6 All right, I'll hear your argument on your motion,
7 Mr. Robinson.

8 MR. ROBINSON: Thank you very much, Your Honor.

9 If it please the Court and Counsel, Your Honor, we
10 have heretofore made a motion to this Court to set aside that
11 verdict which was rendered in the jury -- after the jury trial
12 in Wallace, Idaho of First Degree Murder against Thomas Eugene
13 Creech; challenging the same two-fold.

14 Number one; that the provisions of Idaho Code
15 18-4004 do not conform with the criterion and guidelines set
16 forth in Firman versus Georgia, handed down by the U.S. Supreme
17 Court in June of 1972 and on the second aspect that the death
18 penalty itself is cruel and inhuman punishment; contrary to
19 Provision A of the Eighth Amendment and the Fourteenth
20 Amendment of the United States Constitution.

21 I'd like to cover these in those two segments if
22 it please the Court.

23 First of all, as to the aspect of whether or not
24 the enactment of the death penalty here in the State of Idaho
25 did conform to the guidelines and criterion set forth in

1 Firman versus Georgia and, at the onset, I would like the record
2 to show that I am totally convinced that you, Judge Durtschi,
3 have thoroughly studied that case, Firman versus Georgia, and
4 the other cases.

5 I am sure that the thoroughness that I have seen of
6 you in presiding in this matter over the period of the last
7 year or more, that you have been very conscientious in your
8 studies of this particular decision and the ramifications that
9 they have upon this particular case.

10 First of all, I'm sure the Court also is totally
11 aware of the provisions of 18-4003 in the degrees of murder as
12 it read prior to the Firman versus Georgia decision, wherein it
13 included a descretionary function on the part of the jury, or
14 the Judge for murder in the first degree and setting forth the
15 meaning of those degrees and 18-4004, the punishment for murder.

16 It did state that every person guilty of murder in
17 the first degree shall suffer death, or be punished by
18 imprisonment in the state prison for life and the jury may
19 decide which punishment shall be inflicted. The case of
20 Firman versus Georgia addressed itself specifically to that
21 discretion power on the Court or the jury; saying that that
22 portion was unconstitutional.

23 The re-enactment as the Court is aware of, was
24 re-enactment that made murder in the first degree a mandatory
25 sentence of death; reading "every person guilty of murder in the

1 first degree shall suffer death."

2 Our brief addressed itself to the fact that when the
3 Legislature of the State of Idaho re-enacted this statute all
4 that they did was delete a portion of the discretion, but did
5 not take out the discretion that still is in the statute and
6 that is, specifically, if the jury dislikes or has prejudice,
7 known or unknown, they still have that discretion of finding a
8 person guilty of murder in the second degree; preventing the
9 penalty, or if they do, during the course of the trial, have
10 prejudiced or prejudices, are developed, they can find murder
11 in the first degree, thereby they are still exercising the
12 same discretion that Firman versus Georgia said was not proper
13 and was in violation of the Eighth Amendment and the
14 Fourteenth Amendments.

15 It is our position that the re-enactment has done
16 nothing to cure those ailments that were found.

17 Now, the State, in response to our brief, Your
18 Honor, did cite several cases and each of those cases I have
19 checked over thoroughly and the one in Arizona that reversed
20 and -- excuse me, that affirmed the conviction and the sentence
21 was reduced to life imprisonment, was a case almost specifically
22 in line and on all fours with the State versus Creech case that
23 is now before the Court.

24 On Page 254 of that decision; which is the
25 citation of 506 Pacific Reporter second, commencing at Page 248,

1 on Page 254 they set out specifically the provisions of the
2 statute which did include the words "at the discretion of the
3 jury trying the person charged therewith, or upon a plea of
4 guilty, the Court shall determine the punishment."

5 Now, there is just not that much difference between
6 what that Court found in that case and used as a criterion for
7 setting aside the death penalty that was found in that case than
8 what there was in the previous statute here in the State of Idaho
9 and what the re-enactment statute in the State of Idaho now
10 contains.

11 The discretion is still there and our Idaho
12 Legislature just has not cured that and, therefore, we urge the
13 Court, in the instant case, based upon these citations to uphold
14 the conviction, but set aside the verdict of First Degree Murder
15 and reduce the sentence to life imprisonment.

16 Now, the second portion of our challenge, Your Honor,
17 goes specifically to the death penalty itself as being a cruel
18 and inhuman punishment.

19 Five of the U.S. Supreme Court Justices addressed
20 themselves to this particular question, hearing the arguments
21 in January of 1972 in rendering that decision in *Firman* versus
22 Georgia in June of 1972.

23 There have been many cases that have attempted to
24 address themselves to the application of the law as set forth
25 in *Firman* versus Georgia and presently there are several cases

1 before the U.S. Supreme Court to make this decision as to
2 whether or not they will declare that the death penalty, in and
3 of itself, is unconstitutional.

4 We have urged the Court, based upon the decisions
5 that have been made and written in that case to exert itself
6 in this case and find that the death penalty, in and of itself,
7 is unconstitutional because in this day and age it does violate
8 the human dignity of our society.

9 Now, in making these comments to you as the
10 Court, Judge Durtschi, I want to possibly put in a personal
11 comment. I am not unmindful of what the death penalty is. In
12 my legal career I've been called upon to be a witness to two
13 executions by hanging back in the late 40's. And I have heard
14 and participated in a lot of the arguments, arguments propounded
15 by many across this nation, one Mel Beli in San Francisco, when
16 he was in the discussion with many of us and, specifically that
17 of Mr. Bugliosi of Los Angeles when Melvin Beli made the
18 comment "Have you ever been a witness to an execution?" And
19 that being countered by Mr. Bugliosi saying "Have you ever been
20 a witness to a murder?"; to which Beli replied that he had not.
21 There is the confrontation.

22 Now, these Justices have spoken to the fact that
23 the death penalty is and of itself contrary to the dignity of
24 man at this stage in the history of our society and I believe
25 that is. I am mindful of all of the arguments regarding the

1 death penalty being a deterrent to the commission of the
2 serious crimes by other persons. The statistics do not bear
3 that out. I'm sure that this Court, in knowing the full factors
4 of this case and all of the evidence that was produced has
5 wrestled with this particular problem in this particular case.

6 The State in its response has asked the Court to
7 rubber-stamp and not challenge, or take unto itself a ruling
8 according to this Court's conscience and I, for the life of me,
9 cannot see that to be a valid method or procedure. To me it
10 seems that the judicial system in this United States is made up
11 of each one of the courts, from the District level to the
12 State Appellate Court to the U.S. Supreme Court and that we need
13 not always wait for the nine Justices in Washington, D.C. to
14 give us direction. They have given us their thoughts and ideas
15 as long ago as June of 1972 in regards to the death penalty
16 being contrary to the dignity of man.

17 In the course of the history that we've gained
18 at this point I urge the Court at this time to exert itself in
19 light of all of the words that have been placed before the
20 Court to find that the death penalty, in and of itself, is not
21 constitutional under the written Constitution of the State of
22 Idaho and under the Eighth and Fourteenth Amendments of the
23 United States Constitution.

24 I believe in doing this we have set the stage for
25 this matter to come before all of society and do the real and

1 proper thing that we must do on capital punishment. Thank
2 you, Your Honor.

3 MR. THOMAS: If the Court please. Your Honor, Mr. Robinson
4 has referred to the guidelines set down in Firman versus Georgia
5 and he suggests that the Statute enacted by the Idaho Legislature
6 does not comply with those guidelines. As the Court is no
7 doubt aware, there aren't any guidelines in Firman versus
8 Georgia. There was a short opinion holding the death penalty
9 not constitutionally applied on cruel and unusual punishment
10 grounds and, in that particular case, it was followed by nine
11 separate opinions by every member of the Court and none of
12 them agreed with any of the others. So, it can't be said that
13 there is any consensus in Firman versus Georgia with respect
14 to what circumstances must be taken before the death penalty
15 is unconstitutional.

16 Mr. Robinson argues that the discretionary problem,
17 and I might note at this point that it appears that the one
18 thread running through Firman versus Georgia is that the death
19 is not constitutionally applied if it's discriminatorily applied
20 to certain classes or categories of people; in the case of
21 Firman versus Georgia, black people.

22 Mr. Robinson argues that because the jury has the
23 discretion to find the defendant's guilt of a lesser offense
24 that that same kind of discretion marks this statute as defective.
25 But, the fact of the matter is that Firman versus Georgia

1 simply doesn't address itself at all to that kind of discretion.

2 It is always within the province of the jury
3 to find a defendant guilty of a lesser offense if the defendant
4 shows that. It would not be proper for a jury to find a
5 defendant guilty of a lesser offense if the evidence showed that
6 he was guilty of a higher offense and the instructions of the
7 Court to the jury in a case provides for that.

8 In addition, the question of Federal Constitutionality
9 of this kind of statute is presently before the United States
10 Supreme Court in the case which the Court has held over for
11 consideration of this term.

12 Since the Court is considering these very questions,
13 it seems that it would be premature for this Court to do
14 anything but rely upon the presumption of the validity of the
15 legislative enactment and to pronounce upon the constitutionality
16 of the death penalty on cruel and unusual punishment grounds
17 and those questions are presently being litigated in the highest
18 tribunal in the country.

19 With respect to the question of cruel and unusual
20 punishment, the defendant's counsel suggests that this Court
21 should exercise its conscience. But, the fact of the matter is
22 that the Legislature has traditionally thought of as the body
23 and the part of government properly constituted to do --
24 decide such questions of policy. It is up to the legislature
25 to decide whether a penalty is cruel and unusual or whether it

1 isn't.

2 Unless it can be clearly said that it is cruel and
3 unusual in violation of the Constitution, and I don't think
4 there is any basis upon which that can be said about the penalty
5 applied under this particular statute.

6 We ask the Court to reject the argument of the
7 defendant's counsel and impose the statutory penalty with
8 respect to which no discretion has been left to the Court.

9 MR. ROBINSON: Your Honor, and Counsel, Your Honor, I
10 have, in the written memorandum that has been supplied to the
11 Court; since the Court set this matter over for hearing back
12 on November the 3rd, dug into and dug out of Firman versus
13 Georgia each of the four criterion that we set forth in that
14 memorandum separately and as to each of the arguments that were
15 propounded and placed in that opinion; some 240 pages long,
16 of each of the Justices' writing concurring opinions.

17 Those four categories, criterion which Counsel for
18 the State says are non-existent, are as follows:

19 "The death penalty is degrading and fails to
20 comport with human dignity."

21 Number two: "The mandatory death penalty is
22 arbitrary and discriminatory."

23 Number three: "The mandatory death penalty is too
24 severe a penalty; which is clearly and totally rejected
25 throughout society."

1 Number four: "The mandatory death penalty is
2 patently unnecessary."

3 We've described, with some detail and in referring
4 to that decision, those particular areas and criterion which
5 Firman versus Georgia does give us.

6 The facts of the three cases in Firman versus
7 Georgia are diverse enough for this Court, and any Court, to
8 interpret the length and breadth of the decision of the
9 U.S. Supreme Court was making at that time.

10 Our describing in detail those guidelines, which
11 the legislature should have known about and should have
12 studied in the event, that within the guidelines and scope of
13 Firman versus Georgia they were going to re-enact a death
14 penalty at all. The fact is that some 37 states, as of the
15 first of last month, Washington being the last that I know of,
16 have re-enacted the death penalty statute in their states.

17 In my study of those re-enactments, they've
18 re-enacted with specificity and as to the exactness of the
19 act and the parties that were killed as being a mandatory
20 death penalty and leaving the jury totally out of exercising
21 its discretion. I cite that and the specifics of the most
22 recent state, the State of Washington, in this brief.

23 The Firman versus Georgia did involve race,
24 prejudice, and it did involve prejudice because of the type of
25 crime, or the heinous effect that was involved in said crimes.

1 In this particular case I believe that it was shown to the
2 Court that a jury can even get upset because they have been told
3 falsehoods and they have the right to ignore evidence pointing
4 to a lesser offense and find a defendant before them guilty of
5 the maximum offense of first degree; even though that result
6 may have come from their own emotions, not being exercised with
7 due deliberation and consideration of all that evidence.

8 Therefore, under the criterion that we have set
9 forth in the re-enactment of the Idaho statute, it still leaves
10 the door totally open to the exercise of that discretion which
11 the U.S. Supreme Court says is not proper.

12 It leaves the door open in Idaho for our juries to
13 still discriminate against persons because of sex, race,
14 position, wealth, the economic position and their mannerisms and
15 too much discretion left to them in ascertaining the degree of
16 mentality or "insanity" if the Court please and, therefore,
17 because of all the criterion set forth that we have brought to
18 the attention of the Court, we feel the re-enactment of the
19 Idaho statute does not cure that which *Firman versus Georgia*
20 said was unconstitutional.

21 I will say nothing further in regard to the death
22 penalty itself as, in this stage in history being a proper
23 punishment, because, I'm sure the Court is aware of all of the
24 opinions written by the fine jurists that wrote those opinions
25 and set them forth in full in that 240-page decision.

1 THE COURT: Isn't it true, Mr. Robinson, that even in
2 those states like Washington where they are more specific
3 listing the categories of murder in which the death penalty could
4 be imposed, still don't provide for it being imposed unless it's
5 a first degree murder?

6 In other words, you can -- the concern I've had in
7 trying to apply the -- this Firman case to the death penalty,
8 particularly the three concurring opinions from which form the
9 basis for the States' actions in re-enacting mandatory death
10 penalty statutes and that's Douglas, White and Stuart who all
11 concurred on the basis of the capricious and arbitrary nature
12 of the application or discretion, if you follow that rationale.
13 I have been concerned with the discretion that still is vested
14 in determining the degree of the offense as you've indicated.

15 But, in thinking about it I don't see how you can
16 ever avoid that. In other words, not if you list the
17 categories and say, well, you are only going to apply the death
18 penalty when a policeman is killed or when somebody kills a
19 penitentiary guard or when they kill a hostage. As I
20 understand those statutes you still don't even get to that stage
21 until they find them guilty of murder in a high degree and I
22 don't see how you can ever devise a statute that would deprive
23 the trier of the fact of that discretion that we're talking
24 about.

25 MR. ROBINSON: May I address the Court?

1 THE COURT: Yes.

2 MR. ROBINSON: Your Honor, as we cited on Page 7 of our
3 brief, the reinstatement of that death penalty in the State of
4 Washington limited itself to the killing of an on-duty
5 policeman or fireman, killing for hire, to obstruct justice or
6 during a rape or kidnapping.

7 I believe that the criterion we're speaking of here
8 is the combined working of 18-403, 18-404 which --

9 THE COURT: What verdict does the jury have to render
10 in that Washington statute before you get to that application?

11 MR. ROBINSON: It's my understanding that the actual
12 killing must have been one of those specifics.

13 THE COURT: Without any concern about intent or anything
14 like that?

15 MR. ROBINSON: I'm sure that it has the intent, Your
16 Honor, the wording of the other, justifiable, excusable, I'm
17 sure that that still is in the Washington Code.

18 THE COURT: Does the Washington Code eliminate all the
19 degrees as to those particular categories, so it either has to
20 be not guilty or guilty of murder in one of those categories?

21 MR. ROBINSON: I'm only supposing this, Your Honor,
22 because this wording is the wording of the referendum that was
23 just passed on the popular ballot in the State of Washington
24 and not as yet acted upon by the legislature of the State of
25 Washington for any clarification. The referendum has limited,

1 in the State of Washington, the application of the death penalty
2 by referendum to these very specifics and anything other than
3 that, pursuant to the case cited by the State; which is the case
4 of the State of Washington versus Brown, 509 Pacific Second,
5 742, where the State of Washington Supreme Court did find but
6 that the death penalty -- just from the head-note, but that the
7 death penalty, as determined and imposed under existing laws
8 was not constitutional.

9 Prior to that case of May 3, 1973, they had a
10 statute very similar to that which is here in the State of Idaho
11 which brings me back to the point that I started to make of the
12 interworking of 18-403 and 404 wherein they left in all the
13 language of the premeditation, deliberate, willfulness. All of
14 the discretionary hard-to-define terms that leaves so much in
15 such a wide breadth and scope for the jury to exercise discretion
16 in.

17 All of this was there and existing prior to
18 Firman versus Georgia and 03 was re-enacted with little, if
19 any, change save and except for inclusion of the police officer
20 acting in his line of duty.

21 In 4004 all they did was delete the obvious words
22 of discretion from the previous enacted statute, 4004, leaving
23 out "the jury may decide which punishment shall be inflicted."
24 And leaving out the terms "shall suffer death or punished by
25 imprisonment in the state prison for life."

1 So, they made very little, if any, substantive
2 change in the context of the statute that is now in existence
3 and that which was previously in existence prior to Firman versus
4 Georgia. They did not address themselves to the decision, the
5 criterion and the guidelines as set forth in Firman versus
6 Georgia in that majority opinion.

7 I cannot reply to the Court with statistical data
8 and specifics for all of the other 36 states besides Washington
9 as to the status of what the state of their law is.

10 But, I do find it interesting in those seven or
11 eight cases cited by the State, in each one of them, save and
12 except one, the one in Southeast Reporter, and that was the
13 case of -- I'm not sure if I'm pronouncing the name correctly,
14 McCorqudale, M-c-C-o-r-q-u-r-d-a-l-e versus the State of
15 Georgia case. In all of the others cited by the State in their
16 brief, the conviction was affirmed but they set aside the death
17 penalty because it was not constitutional.

18 THE COURT: Wish to comment on that, Mr. Thomas?

19 MR. THOMAS: I'd just like to say one thing, Your Honor.
20 In the past -- that is, if Mr. Robinson makes something out of
21 the action of the people of the State of Washington in passing
22 the referendum on the death penalty, that tends to suggest that
23 because a majority of the people of Washington have passed a
24 -- such a referendum that the majority of those people do not
25 believe that the death penalty is cruel and unusual punishment

1 and I bring that up because, in one of the opinions in
2 Firman versus Georgia there is reference to the general public
3 feeling about this kind of penalty. It's up to the defendant.

4 If he means to suggest that there is some statistical
5 basis for saying that the majority of the people of this
6 country have concluded that the death penalty is cruel and
7 unusual to produce before this Court some evidence of that and
8 there hasn't been any such showing.

9 We don't believe that the defendant has made any
10 case for setting aside the death penalty on these grounds.

11 The various opinions in Firman versus Georgia,
12 although Mr. Robinson has been able to extract from one or the
13 other some of these points that he's made in his brief, do not
14 represent a consensus of opinion on that and the State doesn't
15 believe there's any basis for believing that the Supreme Court
16 is going to attempt to deprive jurors of the discretion to
17 find people guilty of a lesser-included offense or to make that
18 kind of determination relevant in assessing whether or not the
19 mandatory death penalty statute should be set aside.

20 We would ask the Court, under those circumstances,
21 to uphold the penalty that the legislature of this State has
22 enacted.

23 MR. ROBINSON: Your Honor, may I be heard on one point
24 that was made by Mr. Thomas of the Attorney General's office?

25 THE COURT: Yes.

1 MR. ROBINSON: I had inserted this in my brief and I
2 believe that it is the right interpretation of Firman versus
3 Georgia that when they sent this back out they asked for the
4 will of the people to be determined. Now, true, we have a
5 republic form of government in all of the states and Idaho does
6 not specifically provide, either in its Constitution or in its
7 Statutes, election statutes, that we must submit a matter of
8 this nature or magnitude to the populous or the electorate.

9 But, I believe that the wording in Firman versus
10 Georgia commanded that we do so.

11 Now, our legislature did, as I have related in
12 that brief, re-enacted a statute in the State of Idaho setting
13 forth the death penalty and when it would be applied in this
14 state. We have not tested the wind so-to-speak in the State of
15 Idaho to determine whether or not the majority of the people
16 of this state are, or are not, in favor of the death penalty.

17 I therefore feel that what they did re-enact, they
18 re-enacted in haste, without the study of the decision and
19 without applying the criterion, or even addressing themselves
20 back to the populous and asking for the will of the people and
21 with this magnitude of a sentence of death so permanent
22 certainly that criterion that was set forth is important.

23 THE COURT: Of course, the Courts across the country
24 are having continual litigation and we have sessions coming out
25 regularly now interpreting statutes that have been passed

1 pursuant to Firman versus Georgia such as the Idaho Legislature
2 did. The most recent I've seen, and I couldn't even find the
3 advance sheets, but it was reported in a Criminal Law Reporter,
4 came out in October; which is an Oklahoma Courts of Criminal
5 Appeals case in which exactly the attack you are making here on
6 the Idaho statute appears to be -- have been made from the
7 report in the Criminal Law Reporter.

8 That Court, at least the summary of the decision,
9 indicates that that Court found no Eighth Amendment problems
10 with the Prosecutor's discretion of bringing the charge, the
11 fact finder's ability to convict for a lesser-included offense
12 or the Governor's right to grant clemency.

13 Of course, there is discretion in all of those
14 areas they enumerate. That Court has felt that the discretion
15 inherent in those three steps in the process do not violate the
16 concept that, at least the concurring Judges' suggested.

17 In Firman versus Georgia, however, both the
18 Oklahoma Court and, as I recall, Illinois Court, recently, both
19 statutes, both the Oklahoma statute and the Illinois did, in
20 the appeal process, have some clemency provisions that were
21 discretionary and both Courts held those provisions to be
22 unconstitutional, again, because there weren't -- they said you
23 run into the same problem of possibility of capricious and
24 arbitrary application without guidelines.

25 So, the Oklahoma Court held that part of their

1 statute to be unconstitutional and, just as Illinois did. But,
2 both Courts upheld the mandatory provision, excluding those
3 discretionary parts of the statute. Frankly, that's the only
4 way I can read Firman versus Georgia.

5 After all, you have to face up to the fact that four
6 of the Justices dissented, four of the sitting Justices would
7 have applied the death penalty and upheld it in that very case,
8 two of them granted a partial, would have thrown out the death
9 penalty permanently as unconstitutional without any limitation.
10 Concurring Justices, Douglas, White and Stuart were the ones
11 that all indicated they wouldn't say what their opinion would
12 be if a mandatory statute came before them. They did all
13 suggest that the only defect they found in the statute in those
14 cases were that they left it up to capricious and arbitrary
15 application.

16 Now, I agree that -- and I've thought about this,
17 but there's, probably, no practical way, as long as you have to
18 have a trier of facts making factual determinations and you have
19 different decisions that could be made as far as the
20 culpability of the defendant, the degree of the crime or however
21 that's phrased as long as you have discretion in the fact
22 finder; whether it's the Judge or jury or whatever, even
23 discretion in the Prosecutor as to the degree that's being
24 charged, or the category of murder that's being charged or
25 discretion in the executive to grant clemency. It's going to

1 be impossible to ever get all discretion out of the system at
2 some point, from the Prosecution up to the final decision on
3 clemency by the executive.

4 I can't conceive of, at least a valid way, as long
5 as you have trials and fact finding decisions to eliminate
6 all discretion. I suppose the most you can do is assume, as
7 the Oklahoma Court did, that at least if the discretion is
8 fixed or under control guidelines by the law that that's all
9 that's required and that's what's true in the discretion we're
10 talking about here.

11 The only discretion that the Idaho Legislature has
12 left, other than the discretion of the Prosecutor in bringing
13 the charge and crime charged, the executive clemency, the
14 only discretion the legislature has left is in the jury's
15 finding as to the degree of the offense.

16 Now, that isn't an uncontrolled discretion or an
17 arbitrary discretion or capricious. It's under instructions
18 as to the law governing those decisions and the only alternatives
19 I can see to these cases that are pending before the Supreme
20 Court, they, of course, have the alternative of following
21 Brennan's and Marshall's philosophy and just declaring the death
22 penalty unconstitutional and is a violation of the Eighth
23 Amendment and due process and ending the matter once and for
24 all.

25 The other direction they could go is following the

1 concurring opinions and their suggestions as the -- try to
2 eliminate the capricious and arbitrary application of,
3 perhaps, tightening up the guidelines, providing that the
4 legislatures do have to set definite categories as you've
5 suggested Washington is doing. But, even after they've said
6 that, if that's the way they go, I'm absolutely certain that
7 somewhere in the statutory stream somebody is going to have to
8 exercise some discretion before they even can ever make a
9 finding in finding a person guilty of the category of offense
10 that requires the imposition of a mandatory death penalty.

11 That leaves me at this point with these alternatives,
12 it seems. I could, as I say, just go as you've suggested,
13 Mr. Robinson, accept two Justices of the United States
14 Supreme Court's approach and I think they are the only two that
15 really went that far and just say that it's a denial of due
16 process, it's cruel and unusual punishment and hold it
17 unconstitutional. The only support I'd have for that
18 decision is, as I say, two Justices of the United States
19 Supreme Court in their concurring opinions, because I don't
20 read it -- they certainly didn't get any support for that
21 position from the four dissenting Justices and, while some of
22 the language in Justice Douglas' opinion would support that,
23 Justice Douglas, still, his final words were, he did not
24 express an opinion on a statute that would impose a mandatory
25 death penalty; what he would feel about that.

1 White and Stuart, of course, indicated quite
2 affirmatively that it seemed to me that they felt that kind of
3 a statute would be justifiable and could be upheld. In view of
4 the fact that that same question is now before the United States
5 Supreme Court, it seems to me it would be presumptuous to, at
6 this point, just say this Court determine it's unconstitutional
7 with no more support in the case law than exists for that
8 decision at this point.

9 So, I'm going to not follow that alternative.

10 Once you abandon that position and indicate that it
11 could be constitutionally applied, if you eliminate capricious
12 and arbitrary nature of the application, then it seems to me
13 it does become a legislative matter and our legislature has
14 spoken on it and I feel to accept that legislative dictate at
15 this time.

16 So, I'm going to deny the defendant's motion. I
17 would say this, however, as a caveat.

18 I'm sure that it won't be necessary, in view of the
19 nature of stays inherent in the appeal process for me to
20 exercise this, but I would tell you this, Mr. Robinson. If it
21 ever became appropriate that I certainly would exercise whatever
22 jurisdiction I have to stay any execution of penalty in this
23 case until the United States Supreme Court has spoken on the
24 issue. I say that's rather redundant, because I think that
25 would follow as a matter of course in the way in an appeal

1 process, but --

2 MR. ROBINSON: Thank you very much, Your Honor.

3 THE COURT: Any further matters to come before the
4 Court at this time, before the matter -- other than disposition?

5 MR. ROBINSON: If I may address the Court, yes,
6 Your Honor. I assume that this is -- the Court is asking whether
7 or not there is any legal or just cause that we should not submit
8 at the present time to this Court pronouncing sentence and I'm
9 requested by Mr. Thomas Eugene Creech for a continuance and
10 during that continuance this Court to further order
11 psychiatric examination of him and a pretrial -- or
12 presentence investigation, a thorough presentence investigation
13 conducted by an unbiased group of persons, or persons that have
14 been appointed to perform this function here in the State of
15 Idaho.

16 My reasons, Your Honor, for requesting his further
17 psychiatric examination prior to this Court pronouncing its
18 sentence is, that since his return from Shoshone County and,
19 especially during the last three weeks, he has not felt that he
20 has had thought processes that were in line with normal and
21 usual behavior activities and being fearful of this himself he
22 has asked that I do request further continuance for sentencing
23 until further psychiatric examination has been made.

24 In addition to that, Your Honor, before the Court
25 does pronounce sentence, and I would ask the Court to declare

1 a short recess and allow Counsel to discuss a matter in
2 chambers with the Court and with the defendant being present.

3 THE COURT: Well, what's the State's response to that
4 first request?

5 MR. REMAKLUS: Request for psychiatric examination and
6 presentence?

7 THE COURT: Yes.

8 MR. REMAKLUS: Of course, we will resist that,
9 Your Honor, this being the type of case where presentence
10 investigation, the discretion has been taken away from the
11 Court. The function and purpose of a presentence investigation
12 has been eliminated by the legislature in the mandatory
13 death penalty.

14 Since the Court has no discretion, except as to
15 pronounce the judgment as determined and established by the
16 legislature, this results only in a stay of pronouncement of
17 judgment and performs no useful function; either for the
18 defendant, except to prolong pronouncement of judgment. But,
19 no matter what a presentence investigation report would show,
20 the judgment still remains and any conferences in the Court's
21 chambers in the presence of the defendant I would suggest be --
22 the Court takes the Reporter and also has him present.

23 THE COURT: Well, I'd like to have this matter further
24 pursued because the statute governing the mental disease and
25 defect defense not only limits itself to trial and conviction,

1 but also punishment. As I read it, it provides, "No one
2 suffering from mental disease or defect can be punished or
3 have punishment inflicted."

4 I think that matter probably has to be further
5 pursued. We used to have a statute that expressly covered
6 the infliction of the death penalty and sanity hearing coupled
7 with that provided that penalty couldn't be imposed if the
8 defendant was suffering from insanity. At the time that
9 statute was repealed by our new mental disease and defect
10 statute and that statute still provides "that no person who,
11 as a result of mental disease or defect lacks the capacity to
12 understand the proceeding, shall be tried, convicted, sentenced
13 or punished."

14 So, I assume that statute still applies to the
15 punishment phase of the disposition.

16 I'm going to continue this matter for further
17 proceedings on that request by the defendant and I, in view
18 of the nature of these Thursday arraignment proceedings I'm
19 going to set it on some day other than a regular criminal
20 arraignment day.

21 MR. REMAKLUS: Could we have it, Your Honor, in
22 Cascade on the first Wednesday of the month?

23 THE COURT: Well, I'm not assigned up there this term
24 of the court so I wouldn't be there.

25 MR. REMAKLUS: Thank you.

1 THE COURT: I can set it on January the 6th at, say,
2 3:30?

3 MR. REMAKLUS: What day of the week is that?

4 THE COURT: A Tuesday.

5 MR. REMAKLUS: Tuesday?

6 MR. ROBINSON: We have no conflicts on that date,
7 Your Honor.

8 MR. THOMAS: Is that at 3:30, Your Honor?

9 THE COURT: Yes.

10 MR. REMAKLUS: I have a criminal jury trial set for
11 that date.

12 THE COURT: How about January 13th? That's the next
13 week?

14 MR. REMAKLUS: Could we set it, Your Honor, alternatively
15 on one of those two days, maybe we can have a recess so I can
16 call my office. I don't want to delay this.

17 THE COURT: I could give you another date to consider
18 if you want to do that, January 6th, 13th or 16th.

19 MR. REMAKLUS: What day of the week is the 16th?

20 THE COURT: 16th is a Friday.

21 MR. REMAKLUS: I'm clear on that day.

22 MR. ROBINSON: That's fine, Your Honor.

23 THE COURT: All right, make it January 16th, then, at
24 3:30.

25 MR. REMAKLUS: Do I understand this is on -- under

1 18-210 for mental examination and we're not, Your Honor, going to
2 order a pretrial in this, Your Honor?

3 THE COURT: Presentence? No. If we're going to
4 explore that request at that time and also at that time we can
5 take up your request, Mr. Robinson, I take it. I just don't
6 have time today to take up any matters in chambers.

7 MR. ROBINSON: That's fine, Your Honor.

8 MR. REMAKLUS: Thank you.

9 THE COURT: All right, the defendant will be remanded
10 to the custody of the Ada County Sheriff, then.

11 (Whereupon the matter was concluded.)
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1 BOISE, IDAHO, FRIDAY, JANUARY 16, 1976, 3:30 P.M.

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4 THE COURT: This was the time on which the case of
5 State versus Creech was continued to fix a time certain for
6 consideration of certain matters you raised at the last hearing,
7 Mr. Robinson.

8 I note for the record that you have now filed a
9 formal Motion, making your suggestion, the matter of record
10 as request the matter of a report for further psychiatric
11 examination and evaluation and I take it that's the matter that
12 is before the Court for hearing at this time?

13 MR. ROBINSON: Yes, Your Honor.

14 THE COURT: It seems to me that matter needs to be
15 disposed of before any other proceedings would be appropriate.

16 MR. ROBINSON: Yes, Your Honor, and I would like to urge
17 the Court's consideration for that Motion at this time, with
18 the exception of the last three and a half lines and I would
19 like to delete from that Motion that the evaluation examination
20 be done at the psychiatric section at the Idaho State
21 Penitentiary; that said examination, of course, be conducted
22 here in the Ada County Jail. But, I would still continue to
23 urge that the examination and evaluations that are done, be at
24 the expense of the State of Idaho.

25 THE COURT: Do you have any response, Mr. Remaklus?

1 MR. REMAKLUS: Your Honor, we're not going to really,
2 seriously resist the motion because I think it would be futile
3 to do so.

4 I would suggest, however, that in the event that
5 Your Honor orders a psychiatric evaluation that it be performed
6 by Dr. Michael Estess who is acquainted with the defendant,
7 has the history of the defendant in his files and I would
8 further ask that this matter be set for -- the evaluation be
9 ordered immediately and that we return to court two weeks from
10 this date.

11 THE COURT: Wish to respond, Mr. Robinson?

12 MR. ROBINSON: Yes, if I may be heard further on that,
13 Your Honor.

14 I have talked with Dr. F. LaMarr Heyrend, who has
15 previously conducted a psychiatric examination and evaluation
16 of Thomas Eugene Creech on behalf of the State and, as the
17 Court is well acquainted, that Michael Estess had also
18 conducted his own independent examination and evaluation.

19 Dr. Heyrend's own comments to me were that he did
20 not want to be reappointed for a subsequent examination and
21 evaluation because of the numerous times, the involvement that
22 he has had with Tom Creech prior to this time and, that since
23 this is an examination specifically to determine the mental
24 capacity, abilities and evaluation of Thomas Eugene Creech
25 since the date of the trial and the jury verdict, it would be

1 our position that the Court should appoint a psychiatrist other
2 than Michael Estess or Dr. F. LaMarr Heyrend and we would
3 suggest to the Court the name of Dr. Humiston, psychiatrist here
4 in Boise and would request the Court appoint Dr. Humiston to
5 conduct his examination at State expense here at the Ada County
6 Jail.

7 If it please the Court, a period of two weeks I
8 don't believe is sufficient time for the thorough examination
9 to take place. I would suggest that not only because of the
10 length of time the examination would take, but also because of
11 personal commitments that I have out of state that it be not
12 less than three weeks before the Court asks us to return and
13 the report itself be returnable by the psychiatrist.

14 MR. REMAKLUS: If I may respond, Your Honor.

15 These are the reasons that I think that
16 Dr. Estess would be qualified.

17 We're talking about competency or incompetency
18 subsequent to trial. I think someone who made a prior
19 examination would be much better qualified to make the
20 evaluation at that point than would a stranger to the case.

21 Regardless of what your order may be, we'd like to
22 be heard upon the date after you determine whether or not you
23 are going to order the examination, Your Honor.

24 THE COURT: Well, as I read Section 18-210, it provides
25 that "No person who, as a result of mental disease or defect,

1 lacks capacity to understand the proceedings against him or to
2 assist in his own defense shall be tried, convicted, sentenced
3 or punished for the commission of an offense so long as such
4 incapacity endures."

5 I feel that the defendant is entitled to raise the
6 issue of his mental capacity to understand further proceedings
7 involved with a sentencing and punishment and that he is
8 entitled to an examination for that purpose and limited to that
9 purpose.

10 I understand, and I don't understand the defendant's
11 motion to request that there be any attack upon the determination
12 that's already been made in the trial of this case and prior
13 examinations as to capacity to be tried and, also as to
14 responsibility for the acts committed.

15 As I understand the motion simply raises the
16 issue of any change in condition that's occurred since the trial
17 and the examination would be limited to that issue. But, I
18 will order an examination for that purpose; to determine the
19 present capacity of the defendant to understand further
20 proceedings in this court that might be taken.

21 In the initial defense of mental disease or
22 defect that was raised in this action, the Court, pursuant to
23 the statute, appointed Dr. Estess to make the examination for
24 the Court. I see no reason why I should not continue that
25 same appointment for this further evaluation so far as the

1 Court is concerned.

2 I do note, under the statute the defendant has a
3 right, if he wishes to be examined by another psychiatrist of
4 his own choice that he has that right and I would afford you
5 that right, Mr. Robinson. If Dr. Humiston is your request,
6 why, I'll make that appointment.

7 MR. REMAKLUS: Will that be at the expense of Valley
8 County, then, Your Honor?

9 THE COURT: Yes.

10 MR. ROBINSON: Then you are, in effect, Your Honor,
11 appointing both psychiatrists to appoint --

12 THE COURT: So far as the Court's duty to appoint a
13 psychiatrist, I'm appointing Dr. Estess and I'm granting you
14 the request to --

15 MR. ROBINSON: We do, on the record, request the
16 appointment of Dr. Carl Humiston.

17 THE COURT: Well, I think the requirement, as far as
18 the examination, will depend on when the next proceedings will
19 be appropriate. But, I, of course, feel we do need to have a
20 date certain but, if the doctors can't accommodate their
21 examinations to that date, why, it will simply have to be
22 changed.

23 Being somewhat familiar with their schedules for
24 -- as far as examination, I think, Mr. Robinson's suggestion of
25 three weeks is probably more appropriate because we've had

1 difficulty getting any earlier examinations to the Court.

2 MR. REMAKLUS: I want to look here, if I may, Your Honor.

3 THE COURT: So, we're talking about a February date.

4 MR. REMAKLUS: That would put us the 6th, I'm not going

5 to be here and I will not be available later in February and

6 I would ask to have it set over until the -- if we're going to

7 choose a Friday date, Your Honor, I would ask for --

8 MR. ROBINSON: We'd like to skip Friday the 13th,

9 Your Honor.

10 THE COURT: Well --

11 MR. REMAKLUS: Until the 27th of February. I can be

12 here the 20th, but I would prefer not to.

13 THE COURT: I have a problem. I have a three-week

14 murder trial starting in Elmore County on February 23rd, so --

15 MR. REMAKLUS: Let's put it after that, then.

16 THE COURT: It will either have to be before --

17 MR. REMAKLUS: I'm not going to be here during the

18 early weeks in February so, if you want to set it later it's

19 all right with me.

20 THE COURT: You object to that amount of delay,

21 Mr. Robinson?

22 MR. ROBINSON: No, Your Honor, Friday, March the 5th is

23 -- that's still too soon for the three-week trial you have in

24 Mountain Home?

25 THE COURT: I'm inclined to think they've overestimated

1 their time for that case. I'm -- I think the 5th might be
2 appropriate.

3 MR. REMAKLUS: Thank you.

4 MR. ROBINSON: 3:30, Your Honor?

5 THE COURT: Yes, I'll set it for 3:30 with the
6 understanding that if that trial still is going I may have to
7 adjust that date.

8 MR. ROBINSON: That's fine.

9 THE COURT: At this time we'll set it for March 5th at
10 3:30.

11 All right, I'm going to remand the defendant, then,
12 to the custody of the Ada County Sheriff at this time until
13 that date.

14 MR. ROBINSON: Your Honor, may I assume the State is
15 going to draw the appropriate order and they will incorporate
16 within the terms of that order that both doctors are to be
17 conducting their examination and analysis at the expense of the
18 State of Idaho, or the County of Valley?

19 THE COURT: Well, I think I'll prepare the order.

20 MR. ROBINSON: All right.

21 MR. REMAKLUS: Thank you, Your Honor.

22 THE COURT: We'll be in recess.

23 (Whereupon the matter was concluded.)
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1 BOISE, IDAHO, FRIDAY, MARCH 6, 1976, 3:30 P.M.

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4 THE COURT: This is the time in which the case of
5 State versus Creech was continued to, to obtain a psychiatric
6 evaluations.

7 The Court file reflects that a report has been
8 received from Dr. Estess and also Dr. Humiston. Have you
9 received your copies, Mr. Remaklus?

10 MR. REMAKLUS: I have, thank you, Your Honor.

11 THE COURT: Mr. Robinson?

12 MR. ROBINSON: Yes, Your Honor.

13 THE COURT: Have Counsel had adequate time to review
14 those reports?

15 MR. REMAKLUS: Yes, Your Honor.

16 MR. ROBINSON: I have, yes, Your Honor.

17 THE COURT: All right. Do either one of you desire to
18 contest the findings of the reports, Mr. Remaklus?

19 MR. REMAKLUS: No, thank you, sir.

20 THE COURT: Mr. Robinson?

21 MR. ROBINSON: Yes, Your Honor. I have -- I'd like the
22 record to show that I have examined both reports at this time.
23 I, as Counsel, do not have any desire to examine either of the
24 psychiatrists, nor do I have further proof to put on by other
25 psychiatrists.

1 However, I have, at this time and have just been
2 handed by Mr. Creech a handwritten request and I could either
3 enter that into the evidence at this time for the Court's
4 examination or read it into the record; whichever the Court
5 prefers.

6 May I pass it through the Bailiff to the Court?

7 THE COURT: Yes. Well, let me advise -- Mr. Creech
8 covers two matters in his papers and at least -- that require
9 action by the Court, a request regarding further psychiatric
10 evaluation, also requests that he be permitted to move for a
11 new trial on the ground, I assume, of newly discovered
12 evidence, phraseology in terms of the statute, or rule.

13 I think I need to resolve the matter of the
14 fitness of the defendant to proceed and understand further
15 proceedings before I can entertain any further proceedings in
16 the matter.

17 So, it would not be appropriate for me to
18 consider these matters, other than a further psychiatric
19 examination at this time.

20 As I understand the statutory procedure, either
21 party can contest the findings of the report, if so, the only
22 thing left to do is to set a hearing date to hear any evidence
23 in opposition to those findings. If no one desires to submit
24 evidence in opposition of findings, then it would be necessary
25 for me to make a finding in accordance with the reports.

1 Mr. Remaklus indicates he does not wish to contest
2 the finding of the reports. Mr. Creech, apparently, personally
3 does want to contest the findings of the report, is that right,
4 Mr. Creech?

5 MR. CREECH: Yes, sir.

6 THE COURT: Which we'll note for the record. However,
7 you say you don't contemplate any new or independent evidence
8 in opposition of the reports, Mr. Robinson?

9 MR. ROBINSON: Your Honor, I'd like the record to
10 reflect the fact that both Dr. Estess and Dr. Heyrend had
11 written reports prior to my being into the case and subsequent
12 to my entering the case, around the first of June of 1975;
13 that I had thoroughly examined both doctors on direct and
14 cross-examination during the time of trial; that it was at my
15 request that Dr. Carl Humiston was requested to be a psychiatrist
16 for evaluation, or any circumstances subsequent to the trial.

17 I must advise the Court at this time that I have
18 no evidence of my own that are in conflict with either
19 Dr. Estess nor Dr. Humiston's nor any of Dr. Heyrend's reports
20 and, therefore, that basically is the reason I would have no
21 further contest to make on the reports because I just have no
22 independent source of any other evidence of a contrary result.

23 I must also state for the benefit of the record
24 and the Court that the papers that have just been delivered to
25 the Court, I have not had an opportunity to read, any more than

1 probably the first two or three lines.

2 THE COURT: Well, it's -- if Mr. Creech wants these
3 filed to be made part of the Court's record, there's no reason
4 why both Counsel can't read them. Is that your desire; to have
5 them filed, Mr. Creech?

6 MR. CREECH: Yes, sir.

7 THE COURT: I'll direct the Clerk to file them and put
8 the filing date on them at the recess. We'll take a recess at
9 this time to give both Counsel a chance to read these
10 incidents it's a part of the record.

11 MR. REMAKLUS: Thank you.

12 THE COURT: We'll be in recess.

13 (Recess taken.)

14 THE COURT: Anything further from the State?

15 MR. REMAKLUS: Well, I don't care to comment about this,
16 Your Honor.

17 THE COURT: I -- the only thing then before us right now
18 is the mental evaluations.

19 MR. REMAKLUS: Well, being dissatisfied with the results
20 of psychiatric evaluation, I don't think constitutes grounds
21 for re-evaluation, or constitutes a challenge to the results
22 reached by the two doctors.

23 I think the statement filed merely expresses
24 dissatisfaction and I think that's all we have.

25 THE COURT: Mr. Robinson?

1 MR. ROBINSON: Your Honor, I have already made my
2 comments to the Court and for the purpose of the record at this
3 time I do wish to advise the Court that it is Mr. Creech's
4 desire for examination hearing of the doctors.

5 THE COURT: Well, I assume when you say that that you
6 are intending to participate in that hearing, Mr. Robinson?

7 MR. ROBINSON: Yes, Your Honor.

8 THE COURT: Did you care to subpoena both doctors and
9 examine them at that hearing?

10 MR. ROBINSON: I would assume that is what Mr. Creech
11 does desire, yes, Your Honor. As I have advised --

12 THE COURT: Is that your desire?

13 MR. CREECH: Yes, sir.

14 THE COURT: Well, I want it clearly understood in
15 connection with this hearing, Mr. Robinson, you are still the
16 attorney of record in this matter and I'm not allowing you to
17 withdraw in connection with this hearing and any examination
18 of the doctors that's conducted will be conducted by you and
19 not by Mr. Creech.

20 MR. ROBINSON: Yes, Your Honor, I understand that.

21 I had no other intention nor desire to express to
22 the Court, other than that.

23 THE COURT: How long do you think that will take,
24 Mr. Robinson?

25 MR. ROBINSON: More than likely, three to four hours,

1 Your Honor.

2 THE COURT: Well, we may have to change, depending upon
3 the availability of the doctors, but I'll set it for March 25th
4 at 9:00 if it's agreeable with Counsel.

5 MR. REMAKLUS: What day of the week is that, Your Honor?

6 THE COURT: Thursday.

7 MR. REMAKLUS: I think it's all right. I don't have my
8 diary with me, but I think it's all right.

9 THE COURT: It will be up to Counsel, of course, to
10 procure the subpoenas or procure the attendance of any
11 witnesses they wish to testify at that hearing. The Court
12 isn't going to call anyone on its own.

13 MR. ROBINSON: Yes, I anticipate, Your Honor, that I'll
14 have to subpoena both doctors. I ask at this time whether or
15 not my understanding would be that this would be at the
16 expense of the State?

17 THE COURT: Well, yes, all the other expenses have been,
18 so --

19 MR. ROBINSON: And at this time I would like to renew
20 the previous motion that was made, Your Honor, to insert me in
21 the status of court-appointed counsel for all of these hearings
22 and in the same status for any appeals that may follow.

23 THE COURT: That motion has been ruled on once and that
24 ruling will stand.

25 MR. ROBINSON: All right, sir.

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THE COURT: All right, the defendant will be remanded
until March 25th at 9:00.

Court's in recess.

(Whereupon the matter was concluded.)

1 BOISE, IDAHO, THURSDAY, MARCH 25, 1976, 9:10 A.M.

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4 THE COURT: This was the time scheduled for the hearing
5 on the evaluation of -- that was ordered pursuant to the
6 motion of the defendant.

7 Defendant ready to proceed?

8 MR. ROBINSON: Yes, Your Honor.

9 THE COURT: State ready?

10 MR. REMAKLUS: Yes, Your Honor.

11 THE COURT: I understand Dr. Humiston is here.

12 DR. HUMISTON: Yes.

13 THE COURT: Doctor, if you'd stand up and raise your
14 right hand and be sworn, please.

15
16 CARL E. HUMISTON,
17 produced for cross-examination, having been first duly sworn,
18 took the stand and testified as follows:

CROSS EXAMINATION

BY MR. ROBINSON:

Q Would you state your full name, please, sir.

A. Carl E. Humiston.

Q And what is your occupation?

A. Physician, specializing in psychiatry.

Q And you are duly licensed in the State of Idaho?

A. Yes.

Q Dr. Humiston, will you advise the Court as to your formal educational background in this field as a medical doctor specializing in psychiatry?

A. Graduate of Stanford University, 1951, graduate of Harvard Medical School with an M.D. degree in 1955, one year of internship King County Hospital, Seattle, to 1956, three year University of Washington psychiatric residency training program to 1959 and an additional year at the University of Glasgow in Scotland to 1962; also Board certified in psychiatry and a clinical assistant professor, Department of Psychiatry, University of Washington.

Q And do you belong to any special organizations in the specialty of psychiatry?

A. Yes.

Q Would you advise us what those are?

A. American Psychiatric Association, which I'm a Fellow.

1 Q Any others?

2 A American Society of Clinical Hypnosis, International
3 Academy of Preventive Medicine, Academy of Orthomolecular
4 Psychiatrists and the Northwest -- North Pacific Society of
5 Neurology and Psychiatry.

6 Q All right. Dr. Humiston, would you advise the
7 Court what your involvement has been in private practice?
8 How long have you been in private practice?

9 A I've been in private practice, either full time
10 or part time ever since 1962. Four years full time, then I
11 was director of psychiatric residency training at State Hospital
12 in Washington and still some part-time practice for five years,
13 then full-time private practice again for three years in
14 Tacoma, Washington until I moved here a year and a half ago,
15 full-time private practice here.

16 Q All right. Dr. Humiston, were you requested by this
17 Court, or by me as Counsel for Mr. Thomas Eugene Creech, the
18 gentleman sitting next to me, to conduct an examination for the
19 determination of the mental capacity of Thomas Eugene Creech?

20 A Yes.

21 Q Now, prior to conducting that examination did you
22 take, or were you advised of any history of Mr. Creech?

23 A Not really. I never looked at any medical, clinical
24 or psychiatric records and I had looked at records in the
25 newspaper very superficially and had not really been following

1 the case. So, I have not been provided with a past history.

2 Q All right.

3 A I might say that the request from the Court was to
4 determine his capacity to understand further proceedings in
5 his case; which ordinarily does not require going over the
6 past history, only requires assessing his present mental
7 state. So, I didn't seek such a history.

8 Q All right. Would you advise, however, us as to
9 what your understanding of the history of Thomas Eugene Creech
10 was at the onset of your examination?

11 A My understanding was that he had been convicted
12 of two murders for which he had claimed innocence and that he
13 had been suspected, or accused of a number of other murders,
14 which -- for which he had not been on trial in this instance
15 and that he had been evaluated psychiatrically in connection
16 with the trial and found legally sane for purposes of the trial
17 and that's about it.

18 Q All right. Where did you conduct your examination?

19 A I conducted my examination in an office in the
20 Ada County Jail.

21 Q In the building we're presently in; is that
22 correct?

23 A Yes.

24 Q And when did you conduct this examination?

25 A The afternoon of the 4th of February, 1976.

1 Q Besides yourself and Mr. Creech, who else, if
2 anyone, was present?

3 A I had two fellow professionals who were accompanying
4 me in my activities in a student status. I brought them along.

5 Q Would you name those parties?

6 A I'm trying to think of her name. Well, one was
7 Jane and I can't remember her last name off the top of my head,
8 who is a professional from the Mental Health Center in
9 Richland, Washington. The other one was William Reimer.

10 Q And where does he live?

11 A In Boise.

12 Q And what is his capacity and profession?

13 A He's an -- I've been talking with him about some
14 of the matters of diet and mental health and he asked if he
15 could sit in and ask Mr. Creech some questions, which he did.
16 Some of the things that I was also interested in turned out to
17 be not relevant to his case. So, these people were essentially
18 there as observers, did not really participate; other than a
19 couple of questions about diet.

20 Q All right. Dr. Humiston, did you ascertain at the
21 commencement of your examination as to whether or not
22 Thomas Eugene Creech was under the influence of any drug
23 prescriptions?

24 A Yes. While waiting for him to be brought to the
25 room I asked the jailer to tell me what medications he was

1 receiving and he went through the drawer of containers of
2 pills and read off to me how much of what he was taking; which
3 I recorded in detail in my letter to the Court.

4 Q All right. And at this time would you advise us
5 as to what those drugs were?

6 A Yes. I'll read from that letter. Vistaril, 100
7 milligrams, three times daily for nervousness; Talwin, 75
8 milligrams, four times daily for headaches; Sinequan, 100
9 milligrams and choloral hydrate, two capsules daily for sleep
10 and Donnatal, four times daily for ulcers.

11 Q All right. And what time was it in the day that
12 you conducted this examination?

13 A I kept a record that I was in the jail from
14 2:50 to 3:40, 50 minutes; of which little over 30 minutes was
15 spent in the presence of Mr. Creech.

16 Q All right. At this time of day and with the
17 prescription drugs, what, if any affect, would those drugs
18 that you've just enumerated, have upon the examination you
19 conducted?

20 A Well, I'm not sure that they had any affect on the
21 examination. I'll elaborate a little further.

22 Q If you would, please.

23 A Some of these medications, namely Talwin, Vistaril
24 and Sinequan, could have a sedative effect in -- if they were
25 in sufficient quantities. They could have a sedative effect

1 to the point of making a person dull, or confused. He did not
2 appear dull or confused to me and, therefore, as far as I'm
3 concerned, the medications did not affect my examination.

4 Now, I realize that he may have been in a different
5 mood if he had not been taking them, but in my opinion they
6 were not of sufficient enough effect at that time of day to
7 interfere with the examination.

8 Q All right. Would you describe to the Court the
9 characteristics, mannerisms and attitudes of Thomas Eugene Creech
10 at the onset of your examination on that 4th day of February,
11 1976?

12 A I would say that he appeared very much as he does
13 now sitting to your left, attentive, alert, quiet, answered
14 questions. His state of mind did not change during the half
15 hour that I was there.

16 He was pleasant to me, he was cooperative in
17 answering questions, did not give me any difficulty, did not
18 refuse to answer any questions, actually the best you -- there
19 weren't problems in his behavior.

20 Q By that are you saying, Dr. Humiston, during this
21 over 30 minutes there were no erratic events, behavioral on
22 the part of Mr. Creech, no unusual erratic behavior circumstances?

23 A That's right.

24 Q All right. And, Dr. Humiston, would you advise
25 the Court as to what you did in regard to conducting an

1 examination for psychiatric purposes at this time?

2 A. First I asked -- oh, first I introduced myself and
3 informed him of the purpose of my visit, showed him the copy
4 of the Court order which I had received so that he would be
5 fully aware of why I was there.

6 I then asked him what was his understanding of the
7 nature of the further proceedings in his case. He reported to
8 me that he was scheduled, on the 5th of March, to be sentenced
9 for two murders, of which he was convicted of having committed
10 in November of '74 and that he expected to be sentenced to be
11 hung to death.

12 I then, at that point, I was reasonably satisfied
13 that he understood the nature of further proceedings in his
14 case and continued to interview him in a more general way to
15 further assess his state of mind at present.

16 I asked him whether he had any present complaints.
17 His first response was that his only complaint was some
18 trouble sleeping. I then proceeded with further specific
19 questiong, asking him about specific things. He said that he
20 felt some ulcer, buring pain; that he had had constant
21 headaches for several months, felt a little depressed, claimed
22 to be a little confused off and on, subject to spells of
23 irritability; said that his memory was a little bit off for the
24 last several months.

25 I asked him some questions about how he ate and

1 other symptoms, which he did not have. So, I did a fairly
2 comprehensive review of symptoms that I considered might be
3 relevant and I mentioned only the ones that he came up with.

4 Q Dr. Humiston, in regard to his eating habits, were
5 those present eating habits you inquired about, or did you in
6 fact inquire about eating habits as a child?

7 A. Both, and I found childhood and present and in
8 between eating habits to be not remarkable.

9 Q All right. Well, by the way, Dr. Humiston, at this
10 time did you have any results of blood tolerance tests that
11 had been done on Mr. Creech by Dr. David Weeks of Boise,
12 sometime in the summer of 1975?

13 MR. REMAKLUS: I would object. I think it's outside the
14 scope of the Court's order for the mental examination.

15 THE COURT: This goes into the foundation. Overruled.

16 THE WITNESS: I did inquire about that and I must have
17 simply inquired by phone because I have no written records of
18 it.

19 I remember inquiring of Dr. Weeks and I remember
20 concluding that I couldn't draw much conclusion from the
21 figures he gave me. So, I didn't even record them and I don't
22 remember now what they were.

23 Q BY MR. ROBINSON: All right. Do you recall whether
24 or not the blood tolerance curve was unremarkable and showed a
25 hypoglycemia or blood-sugar problem?

1 A. My recollection was that it was not strictly normal,
2 but that it was not conclusively abnormal.

3 Q. All right. Now, would you then go ahead and tell
4 us the balance of the evaluation, or examination you did for
5 your evaluation?

6 A. The remainder of the time was spent more
7 conversationally. He asked me to look at some of the poetry
8 he had written and he spent a few minutes reading through some
9 of that. My -- for the purpose of the examination I looked at
10 the poetry to see if it showed any signs of being disorganized,
11 dillusional or anything like that and I found no signs of
12 abnormality displayed in the poetry. It was organized. So, I
13 found, again, no signs of mental disorders in the poetry, as I
14 had found none on the interview.

15 Q. Now, on that point, you did report on your letter
16 to the Court in your evaluation, Dr. Humiston, you found that
17 poetry well organized though superficial. Isn't that the word
18 you used in your report?

19 A. Yes.

20 Q. What did you mean by that?

21 A. Well, the poetry struck me as lacking depth of
22 feeling or understanding or artistry or any of those. It was
23 -- we say, not the work of a mature poet, more like I would
24 expect from, say, a high school poetry writer.

25 Q. All right. Now, were there any other methods that

1 you used in your examination, or any other conversation you
2 used in your examination for the purpose of your analysis?

3 A. Well, no other conversation. I might add that an
4 important part of my examination is simply watching him during
5 the whole half hour. A fair amount of my attention went to,
6 simply, visual observations that tends to be particularly
7 revealing of the nature of a person and that did not turn up
8 anything different from what I've already said.

9 Q. What in particular were you looking for?

10 A. I looked for body disorganization, I looked for
11 signs of tension, switching, sense of discoordination between
12 words and feelings; that sort of thing. I did not pick up
13 anything remarkable by my visual observation in those regards.

14 Q. All right. Dr. Humiston, then, based upon the
15 examination that you conducted, first of all, have you advised
16 us of your entire examination now?

17 A. Yes.

18 Q. Would you tell us what your medical opinion as a
19 psychiatrist was and what the results of your analysis were?

20 A. In my opinion, at the time of my examination he was
21 not mentally ill and I would not apply a psychiatric diagnostic
22 label to him.

23 Q. You say you did not apply any diagnostic psychiatric
24 label?

25 A. That's right.

1 Q Is that correct?

2 A Yes.

3 Q And if heretofore there has been some labeling of

4 an antisocial behavioral pattern applied by other psychiatrists,

5 would that be in line with your thinking as a psychiatrist?

6 A It could be.

7 Q What do you mean by "could be"?

8 A Since my conclusion was based entirely -- or let's

9 say 95 per cent on that half-hour interview I had with him and

10 I'm well aware that he may have displayed patterns of behavior

11 in the past that would deserve psychiatric labels and this

12 would be a matter of history which was not, you know, detailed

13 history, not available to me and not necessary for the purposes

14 of my particular examination.

15 I was asked to determine his capacity to understand

16 further proceedings against him, which I found him to be

17 capable of and I was not asked to make a diagnosis. But, I

18 thought it nevertheless to be appropriate to make a comment

19 that I did not come up with my examination for a basis of

20 basic psychiatric diagnosable label.

21 Q At this particular time is Tom Creech a neurotic --

22 yeah, is Tom Creech a neurotic?

23 A Not as far as I'm aware.

24 Q Would this have shown up in your examination?

25 A Not necessarily. See, sometimes a neurosis is

1 manifested by neurotic struggles, such as one often sees in
2 marriages where someone will pick someone to marry who cannot
3 supply what you want and struggle and struggle and try to get
4 it out of that person. That sort of neurotic struggle would
5 not have turned up in my examination of him.

6 See, furthermore, that sort of neurosis does not
7 impair the capacity to understand further proceedings in a
8 legal case and, therefore, I didn't feel it necessary to take
9 this sort of exhaustive history that would turn up that kind
10 of material.

11 Q All right. And did you find that Tom Creech was
12 not a psychotic?

13 A I did find that he was not psychotic.

14 Q And how did you make -- strike that.

15 Would you describe to the Court what you feel is
16 psychotic behavior that you did not find in Thomas Eugene Creech?

17 A Well, the outstanding feature of psychotic state
18 of mind is disorganization of attention and disorganization
19 of thinking; that is, a person can't stay with a sentence from
20 one end to the other, can't clearly hear, perceive or
21 understand what's being said to him, can't come out with the
22 words to say what he wants to say, that kind of thing. That
23 kind of disorganization of attention and thinking and in a
24 half hour of conversation it's pretty easy to determine whether
25 or not a person has that kind of a disorganization and I saw

1 no sign of such disorganization in his case.

2 Q As a result of your interrogation and your
3 analysis of Thomas Eugene Creech, do you feel that he has
4 clear understanding of the procedures he's presently involved
5 in?

6 A Yes.

7 MR. ROBINSON: I -- may I have just a second, please,
8 Your Honor?

9 THE COURT: Yes.

10 (Brief delay.)

11 MR. ROBINSON: You may examine, Counsel.

12 MR. REMAKLUS: No questions, Your Honor.

13 THE COURT: I have no questions. You may step down.

14 MR. ROBINSON: Thank you.

15 THE COURT: You may be excused, Doctor.

16 THE WITNESS: Thank you.

17 MR. ROBINSON: Your Honor, we'd call Dr. Michael Estess,
18 if you'd come foreward, please, sir.

19
20 MICHAEL EGLING ESTESS,
21 produced as a witness for cross-examination, being first duly
22 sworn, took the stand and testified as follows:
23
24
25

CROSS EXAMINATION

BY MR. ROBINSON:

Q Would you state your name and occupation and your address, please.

A Yes. Michael Egling Estess, I'm a physician licensed to practice medicine and surgery in the State of Idaho and I specialize in the practice of psychiatry. My address is 1471 Shoreline Drive, Box 119, Boise, Idaho.

Q Now, Dr. Estess, you've testified in the matter of the State versus Thomas Eugene Creech during the course of the trial in Wallace, Idaho; isn't that correct?

A That's correct.

Q And during that time you gave us all of your credentials, your previous educational background as a psychiatrist; is that correct, sir?

A That is correct.

Q Now, how long have you been in private practice here in Boise, Idaho?

A Approximately two and a half years.

Q All right, sir. Now, Dr. Estess, in February of 1976, this year, were you requested by the Court to conduct a further examination for purposes of evaluation on Mr. Thomas Eugene Creech?

A Yes, I was. Actually, I believe the Court's order is dated January, but I was requested to see him -- Mr. Creech,

1 again, yes.

2 Q All right. And what is your understanding that
3 you were -- what you were supposed to do in regard to that
4 Court order?

5 A Was my understanding that the question had arisen
6 as to whether or not Mr. Creech was capable of understanding
7 the proceedings against him and that he possibly was suffering
8 from some mental illness subsequent -- that had developed
9 subsequent to his trial and that as a result of that mental
10 illness that he lacked the capacity to understand the
11 proceedings against him in some way and I was requested by the
12 Court to see him and ascertain whether or not he did in fact --
13 or was, in fact, suffering from any mental illness and, if so,
14 if it impaired his capacity to understand the proceedings.

15 Q Dr. Estess, on what date did you conduct your
16 examination, or were there more than one occasions that you
17 spent with Tom Creech?

18 A I saw Mr. Creech on two separate occasions, let's
19 see, January the 29th, 1976 and February the 17th, 1976.

20 Q Now, prior to your first examination of Mr. Creech,
21 Dr. Estess, what particular history did you have on Mr. Creech
22 before going into this examination?

23 A Well, I had a history, of course, which I had
24 obtained as a result of my initial evaluation of Mr. Creech for
25 the Court prior to his trial.

1 I had not had any particular communication about
2 him at all subsequent to the trial, but I did, just prior to
3 my seeing him on this first occasion, communicated with the
4 jailers who were caring for him as to whether or not they had
5 noticed any unusual or different change in his behavior,
6 briefly talked with them about how he had been conducting himself
7 in the jail setting since his trial before I talked with him.
8 That was, really, the only different history that I had, I saw,
9 that was part of my evaluation.

10 Q All right. And that was inquiry that you made on
11 January 29th just prior to the first examination?

12 A. That's correct.

13 Q All right. How long were you with him on that
14 date?

15 A. Approximately 45 to 50 minutes.

16 Q Who else was present besides yourself and
17 Mr. Creech?

18 A. No one, other than the fact that we were in a place
19 where other people periodically came in.

20 Q Was this on J-3, the top floor of the jail?

21 A. Actually, I'm not sure. It's where they have
22 offices and I think, maybe, it is the top floor of the jail.

23 Q All right. And would you advise us as to what
24 your examination consisted of?

25 A. Yes. Primarily an interview situation where I

1 just engaged in conversation with Tom about his present
2 circumstances and the first interview was fairly casual. We
3 were in -- I did not even take him into a room, we stayed
4 pretty much in what he considered a "lobby" although most of
5 the time we were alone in the lobby. People did go in and out,
6 but it was a sort of a casual situation and it was, primarily,
7 an interview-kind of proposition; where I just talked with him
8 about where he was and what he was doing and what he was about,
9 that sort of thing.

10 Q Dr. Estess, prior to conducting this examination,
11 or during the examination, did you ascertain what, if any,
12 prescription drugs that Mr. Creech was taking at the time?

13 A Yes. I asked him what he was taking and, then, I
14 later, at another date, I checked with the jailer who was
15 responsible for giving his medication to him but I did -- he told
16 me accurately on that particular day.

17 Q All right. And did you isolate those particular
18 drugs in your written report?

19 A Yes, I did.

20 Q All right. And would you advise us as to what you
21 were told by Mr. Creech that he was taking in the way of
22 prescription drugs and for what purposes?

23 A Yes. He indicated he was taking something for his
24 stomach; that he had stomach pain. He was taking Vistaril;
25 which is a tranquilizer, mild tranquilizer. He was taking

1 vitamins, he was taking chloral hydrate; which is a sedative,
2 hypnotic to sleep, and he was taking Talwin; which is a narcotic
3 which he said he had been on since he was in Wallace and at his
4 trial he was taking Sinequan; which is an antidepressant which
5 he takes at nights, also to help him with sleep.

6 Q Now, if these were taken, according to the
7 prescription, the Talwin three times a day and at night, would
8 they have any affect upon your examination, or your analysis
9 and opinion?

10 A I think it would be more to know that he was taking
11 medication and I think that -- but in terms of, you know, that
12 is why I commented on it, it clearly, you know, would have to
13 be taken into consideration.

14 Q And did you take it into consideration?

15 A Certainly did.

16 Q All right. And to what degree of, or in what
17 regard, did you take the drugs that he was then taking
18 periodically through each day into consideration?

19 A Well, I saw most all of the medication that he
20 was taking primarily described and, as far as I'm concerned,
21 used to control some of the anxiety which he sort of
22 chronically experiences. Although there are a variety of drugs
23 and different families he primarily has been bothered by
24 anxiety in the past and I think that's why he was taking it.

25 I think, basically, it's a minor consideration;

1 although I think he probably is more comfortable since he's
2 been on his narcotic as a result of taking the medication,
3 that's all.

4 Q Now, would you describe the characteristics and
5 mode of behavior of Tom Creech during the period of time that
6 you interviewed him on the 29th of January?

7 A Yes. He presented in a very reasonable casual
8 fashion, was talkative and cooperative with me, quite friendly
9 and seemed informed and seemed relatively free of any
10 significant anxiety at the time of the interview and manifested
11 no significantly deviant, or abnormal behavior at all that I
12 could tell. His general posture and demeanor was pleasant and
13 that was his general presentation.

14 Q I take it from what you've just said, then, that
15 during this first interview there were no erratic behavior
16 circumstances that occurred that Tom Creech participated in?

17 A That's correct.

18 Q All right. And what in particular were you
19 searching for and how did you ascertain from the conversation
20 that you had asked, the proper questions, done the proper
21 things in order to evaluate Tom Creech?

22 A Well, there are a number of things. It seemed to
23 me that the primary purpose of my evaluation was to understand,
24 or to get some feeling for whether or not Tom had an appreciation
25 of the proceedings that he was involved in; that was sort of

1 the whole question about my evaluating him.

2 So, that that was the initial tact that I took in
3 my evaluation of him and that was to have him describe to me
4 where he was at at this point in time and exactly what
5 proceedings he was involved in; which he did very well.

6 So, after discussing that then I went on to discuss
7 with him things that would allow me to draw some conclusions
8 about how he was functioning in a general sense and how much
9 he was appreciative of what was going on around him and the
10 reality that he is presently living in. He demonstrated
11 consistently a capacity to have appreciation of his surroundings,
12 not only immediately, but in the recent past and he described
13 his future in realistic terms; so that the nature of the
14 conversation that he engaged in had, primarily to do with
15 allowing me to assess Tom's capacity to assess his own
16 situation and understand it and present it in reasonable fashion.
17 At the same time I looked for, and watched for any signs that
18 -- or indicators that might be present of serious mental
19 illness.

20 There were no signs of significant mental illness
21 from what I could tell and he seemed to articulate his
22 circumstances very realistically to me as far as the proceedings
23 that he was -- now that he was presently awaiting and being
24 involved in.

25 Q In your opinion, Dr. Estess, is Tom Creech either

1 psychotic or neurotic?

2 A. No, I do not think he is.

3 Q. In the past you have put a label on -- a psychiatric

4 label on Tom's problem; have you not?

5 A. That is correct.

6 Q. And what is that label that you have placed?

7 A. Personality disorder, specifically sociopathic

8 personality disorder is the terms that I've used to previously

9 describe Tom from a psychiatric standpoint.

10 Q. And in this examination on the 29th, did you find

11 any particular signs in Thomas Eugene Creech that would change

12 your opinion of that label that you had placed previously?

13 A. No, not at all. As a result of my interview on

14 this occasion I would say that diagnosis was, which I have

15 previously made, was still accurate.

16 Q. All right. Now, you again examined Tom Creech on

17 the 17th of February, 1976; is that correct?

18 A. That's correct.

19 Q. And approximately what time of day was that?

20 A. Seems to me that it was in the evening. I don't

21 remember the exact time of day, but it seems that it was in

22 the evening.

23 Q. And what period of time were you with Mr. Creech at

24 that time?

25 A. Again about 45 to 50 minutes.

1 Q And was your examination conducted in much the same
2 manner and way that you had previously examined Mr. Creech on
3 the 29th of January?

4 A Similar but in a different setting. This time we
5 were on a different floor in the holding cell, there was a
6 slightly greater degree of privacy on this particular examination
7 and it was in a different setting. That was, really -- but the
8 nature of my relationship and interaction with Tom was
9 essentially the same, with the same purposes but the setting
10 was slightly different.

11 Q And the difference of the setting itself, did it
12 have -- was there presented, because of the setting, any
13 significant difference between your first examination and the
14 second examination?

15 A Not at all.

16 Q And did you find any erratic behavioral
17 circumstances that Tom engaged in at that time?

18 A No, not whatsoever.

19 Q In your medical opinion as a psychiatrist,
20 Dr. Estess, does Mr. Creech understand and appreciate the
21 proceedings he presently finds himself involved in?

22 A Yes, I think he does.

23 MR. ROBINSON: May I have just a second, please,
24 Your Honor?

25 THE COURT: Yes.

1 (Brief delay.)
2 MR. ROBINSON: You may examine, Counsel.
3 MR. REMAKLUS: I have no questions. Thank you, Doctor.
4 THE COURT: You may step down and you may be excused,
5 Doctor, if you want to.
6 THE WITNESS: Thank you very much.
7 MR. ROBINSON: May I have just a couple more seconds,
8 Your Honor?
9 THE COURT: Yes.
10 (Brief delay.)
11 MR. ROBINSON: We have nothing further to present at
12 this time, Your Honor.
13 THE COURT: State have anything further to present?
14 MR. REMAKLUS: Not at this time, Your Honor. Thank you.
15 THE COURT: We'll take a five-minute recess and, then
16 I'll hear any closing statements Counsel want to make as far
17 as this presentation before the Court.
18 (Recess taken.)
19 THE COURT: I'll hear any closing statements.
20 MR. ROBINSON: We have no closing statement to make,
21 Your Honor. I believe the testimony, of course, is here and
22 the evaluation reports speak for themselves.
23 THE COURT: Mr. Remaklus?
24 MR. REMAKLUS: We have nothing.
25 THE COURT: Well, under the statute I'll make the

1 finding in accordance with the reports that have been made by
2 Dr. Humiston and Dr. Estess and find that the defendant does
3 have capacity to understand the pending and further proceedings
4 against him and to assist his Counsel in those proceedings.
5 I will make a finding to that effect. Counsel for the State
6 will prepare appropriate findings and conclusions and order.

7 We have presently pending also Mr. Creech's
8 own motion for new trial that he submitted in addition to the
9 motion for new trial that's heretofore been ruled on submitted
10 by Counsel.

11 I'll hear anything Counsel want to present on that
12 information.

13 Mr. Robinson, do you have anything to say in that
14 regard?

15 MR. ROBINSON: Yes, I do, Your Honor.

16 Your Honor, in regard to the comment made by
17 Mr. Creech on two witnesses, these witnesses, although I've
18 asked on at least three different occasions, have never been
19 divulged to me and during my entire time of the investigation
20 and involvement in this case I am not aware of who the two
21 witnesses that he speaks of are.

22 At this time I would have no further argument to
23 make to the Court in regard to the motions that have been
24 handwritten by Mr. Creech.

25 THE COURT: Want to make any comment on that motion,

1 Mr. Creech?

2 MR. CREECH: No, sir.

3 THE COURT: I'm missing the rules from this set of
4 the Code. Go down to my office and get one.

5 (Brief delay.)

6 THE COURT: Well, I'll advise Mr. Creech, since
7 Counsel has heretofore made the same motion on your behalf you,
8 however, raised a new ground in your own motion that Rule 33 of
9 the Idaho Criminal Rules does provide for the filing of a
10 motion for new trial based on the grounds of newly discovered
11 evidence and allows that motion to be made anytime within two
12 years after the final judgment.

13 I believe that if this rule is read in conjunction
14 with the statute, it does require a showing in support of the
15 motion. I'm simply pointing this out to you to let you know
16 that you still have time to renew the motion or amplify it to
17 conform to the statute in the rules if you want. I think, to
18 conform to the statute and the rule, you would have to state
19 more than you've shown in your present motion. In a sense you'd
20 have to, by affidavit or otherwise, show what the newly
21 discovered evidence is and show that it would be material and
22 likely to bring about a new result in a new trial. A different
23 result in a new trial. All that is required in support of the
24 motion for new trial.

25 The other restriction of the rule is that I'm

1 confronted with in this case is that since there is two years
2 within which to file such a motion the rule contemplates that
3 an appeal might be pending in the meantime before that motion
4 is presented. The rule provides that if an appeal is pending
5 the Court may grant the motion only on remand of the case.

6 Now, as I understand the record in this case
7 there are pending appeals already from the denial of your
8 attorney's motion for new trial and also for the motion for
9 setting aside the verdict and judgment of acquittal. With
10 those appeals pending at this time I couldn't grant the motion
11 anyway until a remand of the case on that appeal, if it is
12 remanded. So, at this time I'm going to deny the motion,
13 pro se motion that Mr. Creech has made without prejudice to
14 renew if you want to within the two-year time limit, renew the
15 motion in an amplified form to meet the requirements of the
16 rule and the statute.

17 Anything further to come before the Court before
18 we proceed with pronouncement of judgment?

19 MR. ROBINSON: We have nothing.

20 THE COURT: State have anything?

21 MR. REMAKLUS: We have nothing, Your Honor.

22 THE COURT: I'm required, Mr. Creech, to review the
23 record in this case prior to pronouncing judgment. The record
24 is somewhat lengthy but I'll have to go through it.

25 The record shows an Information was filed on

1 December 4, 1974 by the Prosecuting Attorney of Valley County
2 charging you with two counts of murder in the first degree;
3 the record shows you appeared on December 4, 1974 with your
4 attorney for purposes of arraignment. At that time you were
5 partially arraigned and the matter was continued for
6 completion of arraignment and entry of a plea.

7 On January 8, 1975, which the case was continued to,
8 you appeared again with your attorney. At that time pleas of
9 "Not Guilty" were entered to both Count I and Count II and the
10 matter was set for trial to commence on May 20, 1975.

11 On the 20th of May, 1975 the trial did commence.
12 On May 21, 1975 a Motion for Change of Venue was made. On
13 May 22nd, 1975 that Motion for Change of Venue was granted.

14 On June 18, 1975 an order was entered pursuant to
15 hearing we had on June 9th, changing counsel to represent you.
16 At that time Mr. Robinson was substituted as counsel of
17 record as your attorney.

18 On July 10, 1975 an order was entered -- excuse me,
19 on July 10, 1975 a hearing was had regarding change of venue
20 and the place of change of venue and an order was entered on
21 July 14, 1975 pursuant to that order and the venue was changed
22 to Shoshone County.

23 On August 14, 1975, pursuant to stipulation, trial
24 was set for October 6th, 1975 to begin in Shoshone County.
25 Trial did commence on October 6, 1975. On October 22nd, 1975

1 the verdict of the jury was rendered, a finding of guilty of
2 murder in the first degree as to both counts.

3 I will ask you at this time whether you have any
4 legal cause to show why judgment should not now be pronounced
5 and I will tell you in this regard, Mr. Creech, you have a
6 right at this time to make any statement that you want to.

7 MR. ROBINSON: Your Honor, Mr. Creech advises me he
8 does not desire to make any statement at this time and, for
9 the record, I have no further legal reason to put before the
10 Court to prevent the sentencing and judgment being announced
11 in this case.

12 THE COURT: All right. No legal cause being shown and
13 none appearing why judgment should not be pronounced, it is
14 the judgment of this Court that you have, having been regularly
15 charged by an information of two counts of the crime of murder
16 in the first degree and jury finding you guilty as charged on
17 both counts, now, therefore, it is ordered, adjudged and
18 decreed that you, Thomas Eugene Creech, are guilty of the
19 crime of murder in the first degree under Count I and guilty of
20 murder of the first degree under Count II of the Information;
21 that as punishment therefor you shall suffer death of the
22 manner provided by the Statute of the State of Idaho to be
23 carried out on May 21, 1976.

24 You are remanded to the custody of the Sheriff
25 of Ada County, Idaho, to be delivered forthwith to the proper

1 custody of the proper officers of the penitentiary of the
2 State of Idaho for execution of the sentence.

3 We'll be in recess.

4 (Recess taken and matter concluded.)
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1 REPORTER'S CERTIFICATE

2
3 STATE OF IDAHO)
4 County of Ada) ss.

5
6 I, JOHN W. GAMBEE, Official Court Reporter of the
7 District Court of the Fourth Judicial District of the State of
8 Idaho, hereby certify:

9 That I attended the hearings and trial of the
10 above-entitled matter and reported in shorthand the testimony
11 adduced and proceedings had thereat; that I thereafter, from
12 the shorthand record made by me at said hearing, prepared a
13 typewritten transcript of said testimony and proceedings; that
14 the foregoing pages numbered 14 through 3060 and 3071 through
15 3141 constitute said transcript and that said transcript
16 contains a full, true, complete and correct transcript of
17 said testimony and proceedings.

18 IN WITNESS WHEREOF, I have hereunto set my hand this
19 22nd day of OCTOBER, 1976.

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22 OFFICIAL REPORTER
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REPORTER'S CERTIFICATE

STATE OF IDAHO)
COUNTY OF ADA) ss.

I, Harry H. Englund, Official Court Reporter of the District Court of the Fourth Judicial District of the State of Idaho, hereby certify:

That I attended the trial of the above-entitled matter and reported in shorthand the testimony adduced and proceedings had thereat; that I thereafter, from the shorthand record made by me at said trial, prepared a typewritten transcript of said testimony and proceedings; that the foregoing 10 pages constitute said transcript and that said transcript contains a full, true, complete and correct transcript of said testimony and proceedings.

IN WITNESS WHEREOF:
I have hereunto set my hand this 28th day of August, 1976.

Harry H. Englund
OFFICIAL REPORTER

1 REPORTER'S CERTIFICATE

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3 STATE OF IDAHO)
4) ss.
County of Ada)

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6 I, MICHELLE BARTLETT, Official Court Reporter of the
7 District Court of the Fourth Judicial District of the State of
8 Idaho, hereby certify:

9 That I attended the Initial Arraignment of the
10 above-entitled matter and reported in shorthand the testimony
11 adduced and proceedings had thereat; that I thereafter, from
12 the shorthand record made by me at said proceeding, prepared a
13 typewritten transcript of said testimony and proceedings;
14 that the foregoing pages numbered 4 through 13, inclusive
15 constitute said transcript and that said transcript contains
16 a full, true, complete and correct transcript of said
17 testimony and proceedings.

18 IN WITNESS WHEREOF, I have hereunto set my hand this
19 30th day of September, 1976.

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24 Michelle M. Bartlett
25 OFFICIAL REPORTER